134-198

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~223~~ 68

WILLIAM HILL, PLAINTIFF IN ERROR,

vs.

THE CITY OF MEMPHIS, MISSOURI.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED SEPTEMBER 6, 1886.

SUPREME COURT OF THE UNITED STATES.

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No. 333.

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vs.

THE CITY OF MEMPHIS, MISSOURI.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because in the record and proceeding, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the March term, 1886, thereof, between William Hill, plaintiff, and The City of Memphis, defendant, a manifest error hath happened, to the great damage of the said plaintiff, William Hill, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 30th day of April, in the year of our Lord one thousand eight hundred and eighty-six.

Issued at office, in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk Circuit Court United States, Eastern District of Missouri.

Allowed by—
SAMUEL TREAT, *Judge.*

1*a* [Endorsed:] No. 2620. United States circuit court, eastern district of Missouri. William Hill *vs.* City of Memphis. Writ of error to the circuit court of the U. S., eastern district of Missouri. Returned and filed 4th day of August, 1886. A. P. Selby, clerk.

Return to Writ.

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal

of said circuit court, at office, in the city of St. Louis, this fourth day of August, A. D. 1886.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of said Court.

2 The United States of America to The City of Memphis, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein William Hill is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 30th day of April, in the year of our Lord one thousand eight hundred and eighty-six.

SAMUEL TREAT,
Judge United States District Court, Eastern District of Missouri.

Service of the above citation waived this 30th of April, 1886.

HENRY A. CUNNINGHAM,
Att'y for Defendant.

[Endorsed:] No. 2620. United States circuit court, eastern district of Missouri. William Hill *vs.* City of Memphis. Citation. Filed April 30th, 1886. A. P. Selby clerk.

3 UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

In the Circuit Court of the United States in and for said District.

Be it remembered that on the twenty-third day of February, A. D. 1886, there was filed in said court a certain petition in words and figures following, to wit:

Petition.

In the Circuit Court of the United States for the Eastern District of Missouri. March Term, 1886.

WILLIAM HILL, Plaintiff, *vs.* CITY OF MEMPHIS, Defendant.

The plaintiff states that he is a resident of the State of Illinois and a citizen thereof, and that the defendant, The City of Memphis, is a municipal corporation existing under the laws of the State of Mis-

souri, lying and being in Scotland county, in said State, and is a citizen of said State of Missouri.

Plaintiff further states that on the first day of March, 1871, the defendant, now The City of Memphis, was then known and designated as the town of Memphis, a municipal corporation in Scotland county aforesaid, and properly styled the inhabitants of the town of Memphis, and that the said town of Memphis was a citizen of the State of Missouri, and as such, in pursuance of law, and after the question had been duly and legally submitted to a vote of the qualified voters of said municipal corporation, and after that more than two-
4 thirds of the qualified voters of said municipality had voted in favor thereof, did subscribe to the stock of the Missouri, Iowa and Nebraska Railway Company, a corporation existing under the laws of the State of Missouri, and then about to construct a line of railroad into and through said town of Memphis, the sum of thirty thousand dollars, and to secure the payment of said stock and as an evidence of the indebtedness thereof and in pursuance of said vote did issue its negotiable mercantile securities in the form of municipal bonds of the denomination of one thousand dollars each, due and payable in — years from the date of issue, with interest at the rate of eight per cent. per annum, having interest coupons thereto attached in the sum of eighty dollars each, each coupon severally and respectively being for one year's interest upon said bonds respectively.

That the said Missouri, Iowa and Nebraska Railway Company was and is a corporation existing under and by virtue of an act of the General Assembly of the State of Missouri, approved February 9th, 1857, entitled An act to incorporate Alexandria and Bloomfield Railroad Company, together with amendment thereto passed by said General Assembly and approved February 19th, 1866, entitled An act to amend an act entitled An act to incorporate the Alexandria and Bloomfield Railroad Company, approved February 9th, 1857, authorizing said company to change the incorporate name; also authorizing said company to extend said road from a point at or near Luray, in Clarke county, Missouri, to Nebraska City, in Nebraska Territory, by way of Rockport, in Atchison county, Missouri, and authorizing said company to adopt any and all of the sections of this act, the same to be binding on said railroad company. The said Alexandria and Bloomfield Railroad Company did accept the provisions of said act in so far as to change the
5 name of said company to that of the Alexandria and Nebraska City railroad; that in pursuance of and by authority of the laws of the States of Missouri and Iowa the said Alexandria and Nebraska City railroad was consolidated with the Iowa Southern Railway Company, a corporation existing under and by the authority of the laws of the State of Iowa, and that the said Alexandria and Nebraska City railroad in the State of Missouri was known and designated as the Missouri, Iowa and Nebraska Railroad Company, the same as hereinbefore stated.

Plaintiff further states that the said bonds issued as aforesaid in payment for said stock recite that they were issued under the powers

contained in the act of the General Assembly of the State of Missouri, approved February 9th, 1857, entitled "An act to incorporate the Alexandria and Bloomfield Railroad Company," the act herein referred to, but it is nevertheless true that said bonds were also issued under the provisions of the general laws of the State of Missouri then in force and applicable alike to railroad companies existing under special charters or under incorporations formed under the general laws, and that the said issue was sanctioned by a vote of more than two-thirds of the qualified voters of said town of Memphis at said election, as before stated.

Plaintiff further states that after said subscription had been made and said bonds issued the said town of Memphis did by its board of trustees recognize and ratify the same and did accept the stock of said railway company so subscribed and paid for by the issue and delivery of said bonds, and after a number of years had passed did sell and dispose of said stock and fully appropriate the same to its own use; that for and during a series of years the said trus-
6 tees of the said town of Memphis caused to be levied and collected the taxes to pay the interest on said bonds, and did so pay said interest and redeemed the coupons of said bonds for a series of years after the same were issued, and did purchase and redeem several of said bonds, and by all its acts and doings as a municipal corporation ratify its act of subscription and fully recognized the validity of said bonds and coupons as binding obligations upon the municipality.

Plaintiff further avers that since the date of said subscription and since the issuance of said bonds and coupons the said municipal corporation has changed its organization, in the manner provided for by the laws of the State of Missouri, from a town to a city of the fourth class, and that as such the defendant, the now City of Memphis, it is the legal successor to the municipal corporation formed by the inhabitants of the town of Memphis, and that the defendant as such successor is charged with the payment of said bonds and coupons.

1. And for his cause of action plaintiff avers that he is the owner and holder of the fourteenth maturing coupon herewith filed, and which *were* detached from bond No. 3 of said series of bonds so as aforesaid issued to secure the payment of said subscription to the capital stock of said Missouri, Iowa and Nebraska Railway Company; that said coupon is payable at the bank of the Farmers' Loan and Trust Company, in the city of New York, on the fourteenth day of March, 1885, and is for the sum of eighty dollars. Plaintiff states that no provision has been made by the defendant for the payment of said coupon, nor is there now nor has there ever been in said bank any money to pay said coupon or any part
7 thereof; that the same is now due and unpaid. Wherefore the plaintiff demands judgment for the sum of eighty dollars and interest thereon from maturity of said coupon.

2. And for further cause of action plaintiff states that he is the owner and holder of the following interest coupons, to wit:

The fourteenth maturing coupon, detached from bonds Nos. 4, 6,

8, 9, 11, 13, 14, 16, 18, 20, 21, 22, 23, 25, 26, 28, and 30, and due March 1st, 1885.

The thirteenth maturing interest coupon, detached from bonds Nos. 3, 4, 6, 8, 9, 11, 13, 14, 16, 18, 20, 21, 22, 23, 25, 26, 28, and 30, due March 1st, 1884.

The twelfth maturing interest coupon, detached from bonds Nos. 3, 4, 6, 8, 9, 11, 13, 14, 16, 18, 20, 21, 22, 23, 25, 26, 28, and 30, due March 1st, 1883.

The eleventh maturing interest coupon, detached from bonds Nos. 3, 4, 5, 6, 8, 9, 11, 13, 14, 16, 18, 20, 21, 22, 23, 24, 25, 26, 28, and 30, due March 1st, 1882.

The tenth maturing interest coupon, detached from bonds Nos. 3, 4, 5, 6, 8, 9, 11, 13, 14, 16, 18, 20, 22, 23, 24, 25, 26, 28, and 30, due March 1st, 1881.

The ninth maturing interest coupon, detached from bonds Nos. 3, 4, 5, 6, 8, 9, 11, 13, 14, 16, 18, 20, 21, 22, 23, 25, and 30, due March 1st, 1880.

The eighth maturing interest coupon, detached from bonds Nos. 2, 3, 4, 5, 6, 8, 9, 11, 13, 14, 16, 18, 20, 21, 22, 23, 25, 26, 28, and 30, due March 1st, 1879.

The seventh maturing interest coupon, detached from bonds Nos. 8, 16, and 30, due March 1st, 1878.

The sixth maturing interest coupon, detached from bonds Nos. 8, 16, and 30, due March 1st, 1877.

The fifth maturing interest coupon, detached from bond No. 16, due March 1st, 1876.

8 That said coupons were severally detached from the bonds above numbered, being a part of the bonds so as aforesaid issued by said town of Memphis in payment for said subscription of stock as stated in the first count herein; that each of said coupons are payable, at the several and respective dates of their maturity, at the bank of the Farmers' Loan and Trust Company, in the city and State of New York, and are each severally and respectively for the sum of eighty dollars.

Plaintiff says that no provision has been made for the payment of said coupons when due, nor is there now nor has there ever been any money in the bank of the said Farmers' Loan and Trust Company to pay said coupons or any part thereof, and that the entire amount of all said coupons is now due and unpaid, for which the plaintiff asks judgment, together with the interest thereon at the rate of seven per cent. per annum upon each of said coupons from their respective dates of maturity, according to the laws of the State of New York, wherein said coupons are payable.

Plaintiff says the principal of the above-described coupons herein sued on amounts to eleven thousand and forty dollars ($11,040.00), for which, together with interest due on each of said coupons from the maturity thereof, plaintiff asks judgment.

F. T. HUGHES AND
HOUGH, OVERALL & JUDSON;
Att'ys for Pl'ff.

And thereupon a summons was issued in said cause in words and figures following, to wit:

9 *Summons.*

UNITED STATES OF AMERICA, } *sct:*
Eastern District of Missouri, }

In the Circuit Court of the United States in and for said District.

The President of the United States to the marshal of the United States in and for said district, Greeting:

You are hereby commanded to summon the City of Memphis, a municipal corporation and a citizen of the State of Missouri, that it be and appear before the honorable circuit court of the United States in and for the eastern district of Missouri on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said district, on the third Monday of March next, then and there to answer the complaint of William Hill, a citizen of the State of Illinois, as set forth in the petition filed in said court on the 23rd day of February, A. D. eighteen hundred and eighty-six.

Hereof fail not, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 23rd day of February, A. D. eighteen hundred and eighty-six.

Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] A. P. SELBY, *Clerk.*

Endorsed upon said summons is the following return of service to wit:

10 *Return.*

UNITED STATES OF AMERICA, } *sct:*
Eastern District of Missouri, }

I return on this writ that I executed the same on the 25th day of February, A. D. 1886, on the defendant, City of Memphis, a municipal corporation, by delivering a true copy of the within writ, with complaint attached, to Elias Scofield, mayor of said city of Memphis, at Memphis, in the above district.

J. E. D. COUZINS,
United States Marshal, Eastern District of Missouri,
By O. K. WHEELER, *Deputy.*

And afterwards, to wit, on the 16th day of March, A. D. 1886, there was filed in said cause an answer in words and figures following, to wit:

Answer.

In the Circuit Court of the United States for the — District of Missouri. March Term, 1886.

WILLIAM HILL, Plaintiff,
vs.
THE CITY OF MEMPHIS, in the State of Missouri, Defendant. } No. 2620.

Now comes the defendant, by Henry A. Cunningham, its attorney, and by leave of court makes this its answer to plaintiff's petition:

1. For its answer to the first count of plaintiff's petition defendant denies each and every allegation therein contained.

2. For further answer to said first count of plaintiff's petition defendant avers that the alleged coupon therein declared upon is not the act or deed of this defendant.

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3. For further answer to said first count of plaintiff's petition defendant avers that plaintiff is not the real party in interest prosecuting this action.

4. For further answer to said first count of plaintiff's petition defendant avers that at no general or special election therein held have two-thirds of the qualified voters of the city of Memphis or of the town of Memphis or of the inhabitants of the town of Memphis, in the State of Missouri, assented to any subscription of stock by any such corporation or to any issue of bonds by any such corporation to the Missouri, Iowa & Nebraska Railway Company or to any other company.

5. For answer to the second count or cause of action in plaintiff's petition contained defendant denies each and every allegation in said count in said petition contained.

6. For further answer to said second count or cause of action in plaintiff's petition contained defendant avers that it did not make the pretended bonds or either of the pretended coupons in said count described.

7. For further answer to said second count or cause of action in plaintiff's petition contained defendant avers that he is not the real party in interest prosecuting this action.

8. For further answer to said second count of plaintiff's petition defendant avers that at no time at any general or special election therein held have two-thirds of the qualified voters of the city of Memphis or of the town of Memphis or of the inhabitants of the town of Memphis, in the State of Missouri, assented to any subscription of stock by any such corporation or to any issue of bonds by any such corporation to the Missouri, Iowa and Nebraska Railway Company or to any other railroad company.

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9. For further answer to said second count of plaintiff's petition defendant avers that by an act of the General Assembly of the State of Missouri entitled An act to repeal an act to incorporate the town of Memphis, approved Dec. 31st, 1859, the said town of

Memphis, in the State of Missouri, did on said date cease to have a corporate existence; that defendant has been since 1880 a *de facto* city of the fourth class, but that between the years 1860 and 1880 there existed in the State of Missouri no lawfully constituted corporate body known or designated as the town of Memphis or the inhabitants of the town of Memphis; wherefore, having fully answered, defendant prays to be dismissed with its costs in this behalf incurred.

HENRY A. CUNNINGHAM,
Attorney for Defendant.

And afterwards, to wit, on the 18th day of March, A. D. 1886, there was filed in said cause a replication in words and figures following, to wit:

Replication.

In the United States Circuit Court for the Eastern District of Missouri. March Term, 1886.

WILLIAM HILL, Pl'ff,
vs.
CITY OF MEMPHIS, Def't. } No. 2620.

Now, at this day, comes the plaintiff, and for replication to defendant's answer denies each and every allegation thereof.

F. T. HUGHES &
HOUGH, OVERALL & JUDSON,
Att'ys for Pl'ff.

13 And afterwards, to wit, on the second day of April, A. D. 1886, at a regular stated term of said circuit court of the United States for the eastern district of Missouri, the following further proceedings were had, to wit:

Case Called.

WILLIAM HILL, Plaintiff,
vs.
CITY OF MEMPHIS, Defendant. } 2620.

Now come the parties, by their attorneys, the plaintiff by Hughes and Overall and the defendant by H. A. Cunningham, and, this case being regularly called for trial and both parties being ready, it is ordered that a jury come; and thereupon come said jury, to wit, F. M. Gifford, Dabney Bowles, James Penn, J. G. Depoyster, Albert Glore, Curtis Rainier, H. G. Bohn, George C. Hays, Luther Armstrong, William A. Stickney, Thomas D. Witt, and Frank O. Sawyer, twelve good and lawful men duly empaneled and sworn to well and truly try the issues joined herein; and thereupon the evidence was partly heard, but, not being concluded at the hour of adjournment, it is ordered that further proceedings herein be continued until to-morrow morning.

And afterwards, to wit, on the third day of April, A. D. 1886, the following further proceedings were had and appear of record in said case, to wit:

Judgment.

WILLIAM HILL, Plaintiff,
vs.
CITY OF MEMPHIS, Defendant. } 2620.

Now again come the parties, by their respective attorneys, the plaintiff by Hughes and Overall and the defendant by H. A. Cunningham, and also come the jury as on yesterday, to wit,
14 F. M. Gifford, Dabney Bowles, James Penn, J. G. Depoyster, Albert Glore, Curtis Rainier, H. G. Bohn, George C. Hays, Luther Armstrong, William A. Stickney, Thomas D. Witt, and Frank O. Sawyer, who, after hearing the evidence and arguments of counsel and receiving the charge of the court, return the following verdict:

"We, the jury, find for the defendant.
"F. M. GIFFORD, *Foreman*"

It is therefore considered by the court that the plaintiff take nothing by his writ herein; that the defendant, The City of Memphis, go hence without day and have and recover of the plaintiff, William Hill, its costs in this behalf expended, and that a fee bill or execution issue therefor.

And afterwards, to wit, on the 30th day of April, A. D. 1886, the following further proceedings were had and appear of record in said case, to wit:

Writ of Error Allowed.

WILLIAM HILL, Plaintiff,
vs.
CITY OF MEMPHIS, Defendant. } 2620.

Now comes the plaintiff, by attorney, and presents to the court his bill of exceptions, which is allowed, signed, and ordered to be filed and made a part of the record herein.

And said plaintiff presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation, citing and admonishing the said defendant to be and appear at said Supreme Court, at the next term thereof, on the second Monday of October next, at Washington, D. C.; which said writ of error is allowed and said citation signed by the judge. Said plaintiff also presents his bond in the penal sum of five hundred dollars; which bond is approved and ordered to be filed as part of the record herein.
15 Said bill of exceptions is in words and figures following, to wit:

Bill of Exceptions.

In the Circuit Court of the United States, Eastern District of Missouri.

WM. HILL *vs.* CITY OF MEMPHIS.

APRIL 2, 1886.

Be it remembered that the above-entitled cause came on for a hearing April 2, 1886, before the court and jury, plaintiff being represented by John H. Overall and F. T. Hughes and the defendant by Henry A. Cunningham, when the following proceedings were had:

Plaintiff, to sustain the issues on his part, introduced an act of the General Assembly of the State of Missouri entitled "An act to incorporate the Alexandria and Bloomfield Railroad Company," approved February 9, 1857, as follows:

Be it enacted by the General Assembly of the State of Missouri as follows:

§ 1. That James Cowgill, Robert E. Hill, Wm. C. Young, A. Maxwell, De Kalb Musgrave, Robert McKee, Thomas C. Rutherford, Francis Smith, Sam. James Fletcher, Willis Curd, Joseph J. Benning, and Reynolds Bane, of the county of Clarke, and all such persons as may hereafter become stockholders in the said company, shall be, and they are hereby, created a body corporate and politic, in fact and in name, by the name and style of the "Alexandria and Bloomfield Railroad Company," and by the same title the stockholders shall be in perpetual succession and be able to sue and be sued, to plead and be impleaded in all courts of record and elsewhere, and to purchase, receive,
16 have, hold, and enjoy to them and to their successors lands, tenements, and hereditaments, goods, chattels, and all estates, real, personal, and mixed, of what kind or quality soever, and the same from time to time to sell, mortgage, grant, alien, and convey, and to make dividends of such portions of the profits as they may deem proper; and also to make and have a common seal, and the same to alter and renew at pleasure; and also to ordain, establish, and put in execution such by-laws, ordinances, and regulations as shall be necessary and convenient for the government of said corporation, not being contrary or repugnant to the Constitution and laws of the United States and of the State of Missouri, and generally to do all and singular the matters and things which to them it shall lawfully appertain to do for the well-being of said corporation and the due management and ordering of the affairs of the same: Provided always, That it shall not be lawful for the said corporation to deal or use or employ any part of the stock, funds, or money in buying or selling any wares or merchandise in the way of traffic or in banking or brokering operations.

§ 2. The capital stock of said company shall be two millions of dollars, divided into twenty thousand shares of one hundred dollars each, and it shall be lawful for said corporation, when and so

soon as, in the opinion of the individuals named in the foregoing section, a sufficient amount of stock shall have been taken for that purpose, to commence and carry on their said proper business and railroad operations under the privileges and conditions herein granted.

§ 3. That said company are hereby authorized and empowered to cause books for the subscription of stock to be opened at such times and places as they may deem most conducive to the attainment of the stock required.

§ 4. So soon as one thousand shares of the stock shall be
17 subscribed the directors shall cause an election to be held for nine directors, at such time and place as they may appoint, and give notice of the same in one or more newspapers published in the State.

§ 5. An election for nine directors shall be held on the first Monday in May in each year and, if not held on that day, at any other time the directors may designate. The election shall be held under the supervision of one or more stockholders, and the persons receiving the highest number of votes shall be elected and continue in office until their successors shall be qualified. Every stockholder shall be entitled to one vote for each share held by him, and he may vote by proxy. Soon after the election the directors shall meet and elect one of their number president, who shall hold his office for the term for which he was elected director and until his successor be qualified.

§ 6. The directors shall appoint agents, clerks, engineers, superintendents, and other officers and servants for said company; shall keep a journal of their proceedings; shall cause correct books and accounts to be kept. They may determine by by-laws what number of directors shall constitute a quorum, and may appoint committees and fill all offices under said company. They shall fix the salaries of the president and the officers and agents, but no director shall receive any compensation for his services as such. They may take security from officers and agents, and may adopt such measures and do such acts as will be best calculated to promote the prosperity and usefulness of said company.

§ 7. The directors shall make and advertise calls for the payment of capital stock at such times and in such manner as they may deem proper, and if any stockholder shall fail to pay such requi-
18 sition within fifteen days after the time appointed said company may recover the same, with interest, or, if not paid, may declare the stock forfeited and sell the same, and no delinquent stockholder shall vote in said company.

§ 8. Said company shall have full power to survey, mark, locate, and construct a railroad from the city of Alexandria, in the county of Clarke, in the direction of Bloomfield, in the State of Iowa, to such point on the northern boundary line of the State of Missouri as shall be agreed upon by said company, and a company authorized on the part of the State of Iowa to construct a railroad to intersect the road authorized to be constructed by the provisions of this act at the most practical point on said State line, and for that purpose may

hold a strip of land not exceeding one hundred feet wide, and may also hold sufficient land for the construction of depots, warehouses, and water-stations, and may select such route as may be deemed most advantageous.

§ 9. The stock of said company shall be exempt from taxation for the period of twenty years after its completion.

§ 10. Said company shall in all things be subject to the same restrictions and entitled to all the privileges, rights, and immunities which were granted to the North Missouri Railroad Company by an act entitled "An act to incorporate the North Missouri Railroad Company," approved March 3, 1851, so far as the same are applicable to the company hereby created, as fully and completely as if the same were herein re-enacted.

§ 11. Said company shall commence the construction of said road within ten years after the passage of this act and complete the same in ten years thereafter.

§ 12. The stockholders of said company shall be and are hereby exempted from the effects of sections nine and ten of the act entitled "An act to authorize the formation of railroad associations and to regulate the same," approved December 13, 1855.

This act to take effect from and after its passage.

Approved February 9, 1857.

Plaintiff next introduced in evidence an act of the General Assembly of the State of Missouri entitled "An act to incorporate the North Missouri Railroad Company," approved March 3, 1851, as follows, to wit:

Be it enacted by the General Assembly of the State of Missouri as follows:

§ 1. A company is hereby incorporated called "the North Missouri Railroad Company," the capital stock of which shall be six millions of dollars, to be divided into shares of one hundred dollars each, the holders of which, their successors and assigns, shall constitute a body corporate and politic, and by the name aforesaid shall have continued succession, may sue and be sued, plead and be impleaded, defend and be defended against, and may make and use a common seal and change or alter the same, and shall be able in law and equity to make contracts; may take, hold, use, possess, and enjoy the fee-simple or other title in and to any real estate, and may sell, convey, pledge, mortgage, or dispose of the same; may make by-laws, rules, and regulations proper and necessary for carrying into effect the provisions of this act not repugnant to the Constitution or laws of the United States or of this State, and shall have the usual and necessary powers of companies for such purposes.

§ 2. David K. Pittman, Charles M. Johnson, William J. McElhiney, Benjamin A. Alderson, Arnold Krekel, Ludwell E. Powell, Robert H. Parks, Andrew King, and Robert Frazier, of the county of St. Charles; John A. Pulliam and Thomas J. Marshall, of Warren county; Charles B. Harper and Jas. H. Rob-

inson, of Montgomery county; Jefferson F. Jones and John Harrison, of Callaway county; R. C. Calhoun and B. Z. Offutt, of Audrian county; William H. Parcels and Jas. C. Goode, of Adair county; George A. Shortridge and Benjamin Sharp, of Macon county, and Dabney Garth, John McCampbell, and Hancock Jackson, of Randolph county, or any nine of them, shall constitute the first board of directors under this act and shall hold their office until their successors shall be qualified. They shall, within any ten years from the date of the passage of this act, meet at such time and place as shall be designated by any three of them and organize as a board of directors, and when organized they shall cause books to be opened for the subscription of the capital stock of said company, at such time and place as they may designate, under the supervision of such persons as they may appoint, and may continue them open so long as they may deem proper, and may reopen such books when necessary until the whole stock shall be subscribed.

§ 3. So soon as fifteen hundred shares shall be subscribed the directors shall cause an election to be held for nine directors, at such time and place as they may appoint, and give notice of the same in two or more public newspapers.

§ 4. An election for nine directors shall be held on the first Monday in April in each year, and if not held on that day an election may be held at any other time that the directors shall designate. The election shall be held under the supervision of one or more stockholders, and the persons receiving the highest number
21 of votes shall be elected and shall continue in office until their successors be qualified. Every stockholder shall be entitled to one vote for each share held by him, and he may vote by proxy. Soon after their election the directors shall meet and elect one of their number president, who shall hold his office for the term for which he was elected director and until his successor shall be qualified.

§ 5. The directors shall appoint agents, clerks, engineers, superintendents, and other officers and servants for said company; shall keep a journal of their proceedings; shall cause correct books and accounts to be kept. They may determine by law what number of directors shall constitute a quorum, and may appoint committees; fill all vacancies in any office under said company. They shall fix the salaries of the president and the officers and agents. They may take security from their officers and agents and may adopt such measures and do such acts as will be best calculated to promote the prosperity and usefulness of said company.

§ 6. The directors shall make and advertise calls for the payment of the capital stock at such times and in such manner as they may deem proper, and if any stockholder shall fail to pay any such requisition within ten days after the time appointed the said company may recover the same, with interest, and if not collected may declare the stock forfeited and sell the same, and no delinquent stockholder shall vote in said company.

§ 7. Said company shall have full power to survey, mark, locate, and construct a railroad from the city of St. Charles, in the county

of St. Charles, passing up the divide between the tributaries of the Mississippi and Missouri rivers, as near as may be, to the northern boundary line of this State, with a view that the same may
22 be hereafter continued northwardly into the State of Iowa in the direction of Fort Des Moines, in that State, and for that purpose may hold a strip of land not exceeding one hundred feet in width, with as many sets of tracks as the said president and directors may deem necessary: Provided, That in passing hills or valleys the said company are authorized to extend said width in order to effect said object, and may also hold sufficient land for the erection of depots, warehouses, and water-stations, and may extend branch railroads to any point in any of the counties through which said road may be located.

§ 8. Said company may take voluntary relinquishments of the right of way for said road and the necessary depots and water-stations, and if the land through which such road shall pass shall belong to minors, in whole or in part, the guardian or curator of such minor shall have power to convey to said company so much of the land as may be necessary for the purposes aforesaid on fair and equitable terms, but every such conveyance by a guardian shall be subject to the approval or rejection of the probate or county court in which such guardianship is pending.

§ 9. If any owner of any tract of land through which such railroad shall pass shall refuse to relinquish the right of way for said road to said county, or if the owners be infants or persons of unsound mind or non-residents of the State, the facts of the case shall be specifically stated to the judge of the circuit court of the county in which such lands are situated, and said judge shall appoint three disinterested citizens of the county to view said lands, who shall take into consideration the value of the land and the advantages and disadvantages of the road to the same, and shall report under oath what damages will be due to said land or any improve-
23 ments thereon, stating the amount of damage assessed, and shall return a plat of the land thus condemned. Notice of such application shall be given to the owner of such land five days before the making of the application, if such owner reside in this State, or to his guardian, and if such owner be a non-resident of this State he may (be) served with actual notice or by an advertisement for four weeks in some public newspaper.

§ 10. The persons appointed to view and value such land shall file their report and plat in the office of the clerk of the circuit court of the county in which the land or a part thereof is situated, and if no valid objection be made to said report the court shall enter judgment in favor of such owner against such company for the amount of damages assessed, and shall make an order vesting in said company the fee-simple title of the land in such plat and report described. Objections to such report must be filed within ten days after the same shall be filed, which objections shall be examined by said judge in term time or vacation, and he may hear testimony and by judgment confirm said report or may set the same aside and appoint three other viewers, who shall proceed in the same manner

and make their report until a report is confirmed: Provided, in order that the progress of the work may not be impeded, That after said viewers have filed their report and plat in the office as aforesaid the company, after having made a tender of the amount of damages to the person or persons, or made a deposit of the same with the clerk of the county court in which the case may be pending, shall be authorized to proceed in the *constitution* (construction) of the work as fully as though no disagreement had arisen. In all such cases the court shall adjudge the costs of the proceed-
24 ings according to equity, and the court shall have power to make such orders and take such other steps as will promote the ends of justice between the owners of such lands and said company.

§ 11. Said company may build said road along or across any State or county road or street or wharves of any town or city and over any stream or highway, but whenever said road shall cross any State or county road said company shall keep good and sufficient causeways or other adequate facilities for crossing the same; and said railroad shall not be so constructed as to prevent the public from using any road, street, or highway along or across which it may pass, and when said railroad shall be built across any navigable stream said company shall erect a bridge sufficiently high on which to cross, or shall construct a drawbridge (the Missouri river excepted), so that in no case shall the free navigation of such stream be obstructed. When any person shall own land on both sides of said road said company, when required so to do, may make and keep in good repair one causeway or other adequate means of crossing the same.

§ 12. Said company shall commence the construction of said road within nine years and shall complete the same within twenty years thereafter; and said company shall have general power to use, manage, control, and enjoy said road; shall determine what kind of carriages shall be used thereon and by whom and in what manner; and shall determine the terms, conditions, and manner in which merchandise, property, and passengers shall be *transferred* (transported); and shall have power to construct and keep such turnouts, gates, bridges, culverts, toll-houses, depots, warehouses, causeways, and other buildings, machinery, and fixtures as may be necessary. Said company may receive such tolls and freights as may be
25 determined upon by the directors, and shall keep posted up estimates of the rates of toll and freight to be charged.

§ 13. Dividends of the profits of said company shall be made annually, or oftener if necessary, but the directors may reserve or set apart a portion of the profits as a contingent fund to meet expenses and losses.

§ 14. It shall be lawful for the county court of any county in which any part of the route of said railroad may be to subscribe to the stock of said company, and it may invest its funds in the stock of said company and issue the bonds of said county to raise funds to pay the stock thus subscribed and to take proper steps to protect the interests and credit of the county. Such county court may appoint

an agent to represent the county, vote for it, and receive its dividends; and (any) incorporated city, town, or incorporated company may subscribe to the stock of said railroad company, and appoint an agent to represent its interests, give its vote, and receive its *demands* (dividends), and may take proper steps to guard and protect the interests *in* (of) such city, town, or corporation.

§ 15. At any annual meeting of said company the directors shall make to the stockholders an exhibit of the affairs and condition of the company; one-tenth part in interest of all (the) stockholders may call a meeting by giving four weeks' notice in two public newspapers.

§ 16. When said road shall be completed the company shall file a plat thereof in the office of secretary of state, and the Legislature may at any time require a statement from the company as to the progress of the work, the amount of business, and the receipts of the company, and the books and accounts of said company at any time (may) be investigated by a committee appointed by the General Assembly.

26 § 17. Said company shall keep a fair record of the whole expense of constructing said road, and at the end of fifty years the State shall be at liberty to purchase said road by paying to said company the amount which it shall be valued (at) by persons to be mutually chosen by the State and by said company, but two years' notice shall be given to said company of the intention of the State to purchase said railroad.

§ 18. When any person shall cease to be a stockholder he shall cease to be a member of said company.

§ 19. If any person shall wilfully injure, obstruct, or destroy said railroad, or shall break, destroy, or deface any work, edifice, or other fixture or improvement belonging to said company, he shall be considered guilty of a criminal offence, and shall be punished in such manner as shall be prescribed by law, and shall also be liable to said company for all damages by it sustained.

§ 20. The operations of said company shall be confined to the general business of locating, constructing, making, and using said railroad and the acts necessary or proper to carry the same into complete and successful operation.

§ 21. The stock of said company shall be considered personal property, and shall be assignable and transferable according to such rules and restrictions as the board of directors shall from time to time make and establish, subject, however, to the laws of this State as the same exist or may be changed hereafter. In case that it shall happen at any time that an election of directors should not be made on any day when, pursuant to this act or any regulations of said company it ought to have been made, the said corporation shall not for that cause be deemed to be dissolved, but it shall and may be lawful on any other day to make and hold an election of
27 directors in such manner as shall be regulated by the by-laws and ordinances of the company.

§ 22. Said company shall have power to receive and hold loans, gifts, grants, and donations of lands, money, or bonds in any quan-

tity from this State or the United States, and may sell, convey, pledge, mortgage, or otherwise dispose of said lands, money, or bonds or any part thereof and apply the proceeds of the same to the construction of said railroad.

This act to take effect and be in force from and after its passage.

Approved March 3, 1851.

Mr. CUNNINGHAM: I do not know whether it is better to dispose of each point as the plaintiff presents it or to wait until they are all presented, but I will now state that point was one that was passed upon by your honor heretofore.

Mr. OVERALL: We haven't got quite through yet.

Mr. CUNNINGHAM: Very well; I only wish to separate one from the other.

Plaintiff next introduced an act of the General Assembly of the State of Missouri entitled "An act to amend an act entitled 'An act to incorporate the Alexandria & Bloomfield Railroad Company,' approved February 9th, 1857, authorizing said company to change the incorporate name of the company and authorizing said company to extend said road from a point at and near Luray, Clarke county, Missouri, to Nebraska City, in Nebraska Territory, by way of or near Rockport, in Atchison county, Missouri, and also authorizing said company to adopt all or any of the sections of this act, the same to be binding on said railroad company," approved February 19th, 1866.

Mr. CUNNINGHAM: I desire to note the objections I made at the previous trial, that this act is repugnant to the constitution or organic law of the State then in force.

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The COURT: I suppose all counsel desires is to make the record complete in order to reach the question.

Mr. OVERALL: I desire next to introduce the record of the Alexandria & Bloomfield Railroad Company, especially that part showing the adoption of the first section of the last act that has been introduced in evidence.

Mr. CUNNINGHAM: I object to the admission of this record until it is proven to be such.

Mr. OVERALL: I will do that. I did not know but we might remove the necessity for that.

Plaintiff then called F. T. HUGHES, who, being duly sworn, testified as follows:

(By Mr. OVERALL:)

Q. Your name is Felix T. Hughes?

A. Yes, sir.

Q. What position, if any, did you occupy in the Missouri, Iowa and Nebraska Railway Company?

A. I have been its general solicitor since, I believe, its organization or about the time it commenced building.

Q. Do you know what book this is? (Book shown to the witness.)

A. Yes, sir; I have had possession of this book for 10 or 15 years.
Q. What book is that?
A. It is the record—the original record book of the Alexandria & Bloomfield, Missouri, Iowa and Nebraska, the Alexandria, Nebraska & Missouri, and Iowa and Nebraska Railway Co's.

Cross-examination by Mr. CUNNINGHAM, counsel for the defendant:

Q. Mr. Hughes, when did you first see this book?
29 A. I think about 1869 or 1870.
Q. Where?
A. In the office of the Missouri, Iowa and Nebraska Railroad Company.
Q. Office of the Missouri, Iowa & Nebraska Railroad Company?
A. Yes, sir.
Q. Did you ever know that book to be the record of the company called the Alexandria & Bloomfield Railroad Company, of your own knowledge?
A. I know that this is the book that has been in the office. I have had this book in court and have had it before the board of directors, and I know that we have used this in connection with the board of directors ever since 1870.
Q. That is not the question which I asked. The question which I asked is, What evidence have you that that is the record of the Alexandria & Bloomfield Railroad Company—not of the Missouri, Iowa and Nebraska Railroad Company?
A. Well, sir, the evidence I have is that I obtained it from the record—from the custodian of the——
Q. Who was the custodian?
A. Mr. Fitzhenry.
Q. What was he?
A. Secretary of the Missouri, Iowa & Nebraska Railway Co.
Q. Secretary of the Missouri, Iowa & Nebraska Railway Company?
A. Yes, sir.
Q. But not of the Alexandria & Bloomfield railway?
A. No, sir.
Q. You never knew the record when it was ever in possession of the Alexandria & Bloomfield Railroad Company?
A. No; I did not.
Q. Didn't you testify on the previous trial of this case that you first saw that book in 1872?
A. I don't know about that.
Q. Did you so testify in the previous trial?
30 A. I can't say whether I so testified in the previous trial or not.
Q. May you not be mistaken if you say you saw it before 1872?
A. No; I think I am not.
Q. Well, which is the fact?
A. The facts are I saw this book in—about, I think, in September, 1870.

Q. For the first time?

A. Yes, sir.

A. And it was then in the custody of the company called the Missouri, Iowa & Nebraska Railway Co.?

A. Yes, sir.

Q. You never saw it or knew it in the custody of any company called the Alexandria & Bloomfield Railroad Company?

A. No.

Mr. CUNNINGHAM: I submit to the court it has not yet been proven to be the record of the Alexandria & Bloomfield Railroad Company.

Plaintiff then introduced a copy, certified to by Michael K. McGrath, secretary of state of the State of Missouri, on the 8th day of March, 1884, of the articles of consolidation of the Iowa & Southern Railway Company and of the Alexandria & Nebraska City Railway Company, forming the Missouri, Iowa & Nebraska Railway Co., as follows:

STATE OF MISSOURI, *ss:*

I, Michael K. McGrath, secretary of state of the State of Missouri, hereby certify that the annexed pages contain a full, true, and complete copy of the articles of consolidation of the "Iowa Southern Railway Company" and the "Alexandria and Nebraska City Railroad Company" under the name of "Missouri, Iowa & Nebraska Railway Company," filed May 11, 1870, as the same appears on file and of record, as the law directs, in this office.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Missouri.

31 Done at office, in the city of Jefferson, this eighth day of March, A. D. eighteen hundred and eighty-four.

[SEAL.] M'CH'L K. McGRATH,
Secretary of State.

Articles of Consolidation.

Articles of consolidation made and entered into this twenty-sixth day of March, in the year of our Lord one thousand eight hundred and seventy, between the Iowa Southern Railway Company, a corporation existing under the laws of the State of Iowa, and the Alexandria & Nebraska City Railroad Company, a corporation existing under the laws of the State of Missouri.

Whereas the railways respectively owned by the said companies above named constitute a continuous line of railway for the passage of cars from the city of Alexandria, in the State of Missouri, to a point on the Missouri river in Iowa near Nebraska City, in the State of Nebraska, and the directors of the said companies upon mature consideration have determined that the interests of the respective stockholders of said companies and the public interests and convenience will be greatly promoted by the union of their several

roads into one road and by the consolidation of the respective stocks of said companies into one common consolidated stock; and

Whereas the said companies are authorized by acts of the Legislatures of the said States of Iowa and Missouri to effect such union of their respective roads and to form by consolidation of their respective rights and franchises one company, and have agreed so to do upon the terms and conditions hereinafter mentioned and contained:

Now, therefore, this agreement, made by and between the
32 corporations above named, parties hereto, under and by virtue of the authority conferred upon them by the laws of the said several States, witnesseth: That the said Iowa Southern Railway Company and the said Alexandria and Nebraska City Railroad Company do agree, and each for itself doth severally agree, that the said companies shall be consolidated into and form one corporation under the name and style of the Missouri, Iowa and Nebraska Railway Company, and in pursuance of the said acts of the Legislatures of the said States of Iowa and Missouri the said parties hereto do hereby prescribe the following terms and conditions of the said consolidation, and do respectively agree thereto and to the mode of carrying the same into effect as herein provided for:

Article 1st.

The directors of said Missouri, Iowa and Nebraska Railway Company shall be for the present thirteen in number, which said number may at any future election held by the stockholders, by a resolution first passed by a two-third vote of said stockholders, be reduced to nine in number, all of whom said directors shall be stockholders in the corporation. The following-named persons shall constitute the first board of directors of said Missouri, Iowa and Nebraska Railway Company: James Fitzhenry, Geo. M. Ochiltree, E. Pratt Buell, Peter W. Plantz, Enoch Hinckley, William Bradley, S. A. Dickey, C. H. Howell, John A. Talbot, Jacob Rummell, C. W. Bowen, James A. Breazeale, and F. M. Drake, and shall hold their offices until the first Monday in January, A. D. 1871, as provided and in accordance with the provision of this article.

Article 2nd.

Said directors shall at their first meeting after their election elect a president and vice-president from their own number, and
33 shall also then, or as soon thereafter as convenient, elect or appoint a secretary, treasurer, and superintendent of said company and provide for the appointment of such other officers, engineers, clerks, agents, assistants, and other employees as they shall from time to time find necessary for the proper transaction of the business of said company.

Article 3rd.

The annual election of directors shall be held on the first Monday of January of each year, at Centerville, Iowa, provided if such

election be not held as aforesaid it may be held at any subsequent period, of which three weeks' notice shall be given in two newspapers on the line of said road, one of which shall be published at Centerville, Iowa, or wherever the principal place of business may at the time of said publication be, and the other in Missouri, unless said principal place of business should be in Missouri, in which case the publication should be in Iowa. The persons receiving the highest number of votes shall be directors to succeed those whose term of office shall have expired.

Article 4th.

Each stockholder shall be entitled to vote in person or by proxy, duly authorized, one vote for each share of stock he may own at the commencement of each election.

Article 5th.

After the consolidation herein provided for is perfected, stockholders in said consolidated company only by surrender and exchange of their certificates in their several companies shall be entitled to vote at any meeting of the stockholders of said consolidated company.

Article 6th.

The capital stock of said Missouri, Iowa and Nebraska Railway Company shall be thirteen millions of dollars, to be
34 divided into one hundred and thirty thousand shares of one hundred dollars each, and the directors may increase the capital stock thereof when necessary upon the approval of a majority of the stockholders of said consolidated company.

Article 7th.

The private property of the stockholders is hereby exempted from liability for the debts of the company except to the amount of the unpaid instalment of any stockholder. The stock of said corporation shall be transferable under such rules and regulations as may be deemed expedient by the board of directors.

Article 8th.

Upon the surrender of the present certificates of stock now issued and outstanding of either of the companies herein consolidated a like amount of the stock, at par, shall, without delay, after its consolidation, be issued in return thereof to the holders thereof.

Article 9th.

In all cases in which subscriptions or agreements with either of said companies parties hereto for the stock of either of said companies have been heretofore made by any person or persons or bodies politic of corporate and said subscriptions or contracts for

stock yet remain unpaid or unperformed, either in whole or in part, the stock of said consolidated company shall, upon payment of said subscriptions or performance of said contracts, be issued to the said subscribers in the same manner as the several companies parties hereto would have been bound to issue their stock, respectively, had not this consolidation taken effect.

Article 10th.

All and singular the rights and franchises, privileges, real
35 estate, depot grounds, rights of way, road-bed, railway, iron rails, engines, cars, machinery, rolling stock, debts, dues, demands, choses in action, and property of every description, name, and nature in which the said Iowa Southern Railway Company and the Alexandria and Nebraska City Railroad Company have, respectively, any rights, title, or interest, whether in possession, reversion, or remainder, with the appurtenances, upon the ratification of these articles of consolidation, as herein and by law provided for, and from thenceforth shall be held, owned, and controlled by the said Missouri, Iowa and Nebraska Railway Company, their successors and assigns, as fully and completely to all intents and purposes as the said several companies do or can now hold, own, use, or control the same, and no further conveyance or assurance shall be required for the full and complete vesting thereof in said Missouri, Iowa and Nebraska Railway Company.

Article 11th.

All the books, vouchers, records, muniments of title, and other documents pertaining to the business or property of the said several companies parties hereto shall be placed in the office of the secretary of said consolidated company, and the said books, records, vouchers, and papers shall be subject to the proper examination and inspection of all persons interested therein, who shall have the same access thereto as if the same had remained in the office of the original companies.

Article 12th.

The principal place of transacting the business of the consolidated company shall be at Centerville, Appanoose county, Iowa, which place of business may be changed to any other point on said line at any time, in accordance with the provisions of article sixteen of the articles of incorporation of said Iowa Southern Railway Company.

Article 13th.

36 The line of the consolidated railway shall extend continuously from the city of Alexandria, Clarke county, Missouri, on the Mississippi river, its eastern terminus as the same is now located, and partially graded to Centerville, in Appanoose county, owa, thence west to the Missouri river, as contemplated by the

charter of the Iowa Southern Railway Company, and the said consolidated company shall complete and put in operation said line of railway from the city of Alexandria, Missouri, to Centerville, Iowa, and from thence westward to the Missouri river as soon as practicable, and shall continue to maintain and operate said railway as a first-class road at, from, and between the said termini, throughout its entire length, during the corporate existence of the said consolidated company.

Article 14th.

The said consolidated company shall assume and fulfill and finally settle, pay, and dismiss all debts owing and all contracts and agreements or other obligations entered into by either of said companies of every kind and nature, legal and equitable.

Article 15th.

In order to facilitate the settlement of all claims, debts, or obligations of either of the companies parties hereto, and properly protect the interests of all parties interested, it is agreed that an auditing committee from each of said companies parties hereto, consisting of three members each, shall be appointed to audit and allow all just claims against these said respective companies, or such amounts thereof as they shall find just and equitable. The said committee for the auditing of the claims against the Iowa Southern Railway Company shall consist of C. W. Bowen, Jacob Rummell, and John A.
37 Talbot, and the said committee for auditing of the claims of the Alexandria and Nebraska City Railroad Company shall consist of James Fitzhenry, Geo. M. Ochiltree, and Enoch Hinckley.

Article 16th.

The consolidated company, in order to raise money necessary to construct, complete, equip, and operate the line of railway formed by this consolidation and every part thereof, shall have the right and power to borrow money to an amount not exceeding two-thirds of its capital stock, and to issue the bonds of the consolidated company therefor, and to secure the payment of the same by a first mortgage or deed of trust on all the property, rights, and franchises of the said consolidated company lying between the Mississippi and Missouri rivers, in the States of Missouri and Iowa.

Article 17th.

It is agreed that these articles of consolidation shall be submitted to the stockholders of each of said companies parties hereto at a meeting thereof called separately for the purpose of taking the same into consideration. Due notice of the time and place of such meeting and the object thereof shall be given. The time of such meeting of the stockholders of the Iowa Southern Railway Company shall be on the 23rd day of April, A. D. 1870, and the place the town of Centerville, Appanoose county, Iowa. The time of such meeting of the

stockholders of the said Alexandria and Nebraska City Railroad Company shall be on the 2nd day of May, A. D. 1870, the place the city of Alexandria, in the State of Missouri.

Article 18th.

In witness whereof the corporate seals of the respective companies parties to this agreement have been hereunto affixed in quadruplicate, by order and in the presence of the directors of each of
38 said companies, duly convened, a quorum of each of the said boards of directors being so present and assenting thereto, and is attested by their respective signatures hereto, on behalf and by order of said boards of directors, and the presidents of each of said companies have also, at the same time and in behalf of the said respective companies, hereto affixed their names in virtue of resolutions of said several boards of directors passed at respective meetings thereof.

IOWA SOUTHERN RAILWAY COMPANY,

[SEAL.] By F. M. DRAKE, *President.*

Attest: C. W. BOWEN, *Secretary.*

F. M. DRAKE,
C. W. BOWEN,
WM. BRADLER,
J. A. BREAZEALE,
JOHN A. TALBOT,
S. DICKEY,
JACOB RUMMEL,
C. H. HOWEL,

Directors of the Iowa Southern Railway Company.

ALEXANDRIA & NEBRASKA CITY R. R. CO.,

[SEAL.] By E. PRATT BUELL, *President.*

Attest: P. W. PLANTZ, *Secretary.*

E. PRATT BUELL,
G. M. OCHILTREE,
E. HINKLEY,
S. M. YOUNG,
P. W. PLANTZ,

Directors of the Alexandria and Nebraska City Railroad Company.

I, C. W. Bowen, secretary of the Iowa Southern Railway Company, do hereby certify that in pursuance of notices published in the Loyal Citizen, a newspaper published in the town of Centerville, Appanoose county, Iowa, the principal office and place of business of said company; also in a newspaper published in the town
39 of Bloomfield, in the county of Davis and State of Iowa, through which counties the line of said company is established and the road is to run, the stockholders of said company

met at said company's office, in the town of Centerville aforesaid, on Saturday, the 23rd day of April, 1870, to take into consideration the within foregoing agreement, and they then and there proceeded to vote by ballot for the adoption or rejection of said agreement; that at said meeting 8,755 votes were cast, each vote representing one share of stock; that all of the 8,755 votes so cast were cast in favor of the adoption of said agreement, and that none of said votes were cast against its adoption, and that the entire number of shares of stock of said company is 10,280, and that therefore the stock so voted as aforesaid in favor of said agreement is more than four-fifths of the entire stock subscribed of the company.

In witness whereof I have hereunto set my hand and affixed the seal of the said company, at Centerville, Iowa, this 23rd day of April, A. D. 1870.

[SEAL.] C. W. BOWEN,
Secretary of the Iowa Southern Railway Company.

I, P. W. Plantz, secretary of the Alexandria and Nebraska City Railroad Company, do hereby certify that in pursuance of the notice published in the Alexandria Commercial, a newspaper printed and published in the city of Alexandria, Clarke county, in the State of Missouri (the principal office and place of business of said company being in said city of Alexandria), the stockholders of said company met at the Pearl Street House, in said city of Alexandria, on Monday, the 2d day of May, 1870, to take into consideration the within and foregoing agreement, and they then and there proceeded to vote by ballot for the approval or disapproval of said agreement. That at said meeting 4,873 votes were cast, each vote representing one share of stock; that all of the 4,873 votes so cast were cast in favor of the approval and adoption of said agreement, and that none of said votes were cast against its approval and adoption, and that the entire number of shares of stock of said company does not exceed 6,750; and that therefore the stock so voted as aforesaid in favor of said agreement is more than two-thirds of the entire stock of the company.

And I further certify that on the same day, and immediately after the meeting of the said stockholders had adjourned, the board of directors of the Alexandria and Nebraska City Railroad Company met, as required by law, to carry the said vote and agreement into effect, and did adopt the name of the "Missouri, Iowa & Nebraska Railway Company" as the corporate name for the consolidated company, and did call in the certificates of stock outstanding in said Alexandria and Nebraska City Railroad Company to be exchanged for stock in the said new company by ordering and directing notice to be given to holders of said outstanding certificates of stock to present the same to P. W. Plantz, the secretary of said Alexandria & Nebraska City Railroad Company, to be so exchanged on or before the first day of July, 1870.

In witness whereof I have hereunto set my hand and affixed the

seal of the Alexandria & Nebraska City Railroad Company this third day of May, A. D. 1870.

[SEAL.] P. W. PLANTZ,
Secretary of the Alexandria & Nebraska City Railroad Company.

Filed May 11th, 1870.

FRANCIS RODMAN,
Secre'ty of State.

41 The COURT: What is the date of that?

Mr. OVERALL: The date of the certificate is March 8, 1884.

The COURT: The date of the alleged consolidation?

Mr. HUGHES: May 3, 1870.

Mr. OVERALL: May 2nd, 1870.

Mr. CUNNINGHAM: I object to it on the ground that it shows no authority for this company here named whatever. It is not pretended in this article of consolidation that the Alexandria & Nebraska City is the Alexandria & Bloomfield Railroad Company; that is not shown by these articles at all.

I now desire to call attention to the fact that in this act of 1866 there is a change of name of the Alexandria & Bloomfield Railroad Company by section 1, as follows:

"That the Alexandria & Bloomfield Railroad Company may change the corporate name of said company to that of the Alexandria & Nebraska City railroad."

These articles of association are made in behalf of the Alexandria & Nebraska City railroad. Having introduced these articles of association I now ask Mr. Hughes whether this book came into the hands of the Missouri, Iowa & Nebraska Railroad Company as the successor of the Alexandria & Bloomfield or the Alexandria & Nebraska City Railroad Company—whether you know that fact?

WITNESS: I know that this is the book that was in their possession in the fall of 1870, and has always been used and read as the record of the Alexandria & Bloomfield and Nebraska City railroad.

Mr. CUNNINGHAM: I object to this as incompetent.

Mr. OVERALL: I offer the book in evidence.

The COURT: I will take it subject to exceptions.

42 Mr. CUNNINGHAM: I merely except to the ruling of the court and also I desire to note my exceptions to the offering of the original record. I think that they should offer a certified copy, because where they offer everything in this way it is very difficult for the stenographer to report everything that they read.

Mr. OVERALL: I will read from page 80 of this book:

"At a meeting of the board of directors of the Alexandria & Bloomfield Railroad Company, held pursuant to adjournment, at the office of said company, in Alexandria, Missouri, on the 25th of August 1866.

Present: C. P. Buell, president; J. H. Green, C. O. ——, S. M.

Young, and E. Scott, directors. The secretary being absent, J. H. Hough was duly appointed secretary *pro tem.*

James H. Green offered the following resolution, which was, on motion, unanimously adopted:

Resolved, That section 1 of the act passed by the General Assembly of the State of Missouri at the last annual session thereof, entitled "An act to amend an act incorporating the Alexandria & Bloomfield Railroad Company," approved February 9, 1857, be, and the same is hereby, adopted as the law applicable to this company, and that on and after the passage of this resolution the same shall take effect and be binding upon this company the same if the said section had been incorporated in and formed a part of said original act of incorporation."

These articles of consolidation which I have read to the court are considered in evidence.

I now desire to introduce the revised ordinances of the city of Memphis, approved June 18, 1880, printed and published by authority of the board of aldermen of the city of Memphis, Missouri. I desire to read the certificate first, as follows:

43 STATE OF MISSOURI, } ss:
County of Scotland, }

I, James M. Penny, clerk of the board of aldermen of the city of Memphis, county of Scotland, State aforesaid, do hereby certify that I am the lawful custodian of the records, books, and papers of said city; that the book or pamphlet to which this is attached is a copy of the book of the ordinances of the city of Memphis, together with the proceedings of the board of aldermen in organizing said town into a city of the fourth class under the laws of the State of Missouri.

Given under my hand and seal this 16th day of September, 1881.

(Signed) JAMES M. PENNY,
Clerk of the City of Memphis.

(With seal attached.)

"STATE OF MISSOURI, } ss:
County of Scotland, }

I, Samuel C. Knott, mayor of the city of Memphis, county of Scotland, State aforesaid, hereby certify that James M. Penny is the duly elected and qualified clerk of the said city and is now fulfilling the duties of said office, and that his certificate hereto attached is in due form.

Given under my hand this 16th day of September, A. D. 1881.

S. C. KNOTT,
Mayor of the City of Memphis."

Mr. CUNNINGHAM: I object to this as incompetent and irrelevant.

The COURT: When were those bonds dated?

44 Mr. OVERALL: In 1871, at the time the present city of Memphis was the town of Memphis, and the object of intro-

ducing these ordinances is to show the change from the original town of Memphis to a city of the fourth class under the general statutes of Missouri — successorship.

The COURT: Merely for the purpose of showing that if the town of Memphis is liable you think the city of Memphis is?

Mr. OVERALL: Yes; just a change of name.

Mr. CUNNINGHAM: The point I make is that it is not competent or sufficient evidence for any purpose.

The COURT: That will merely go to show the liability that exists, if any.

Plaintiff next introduced the proceedings of the town board of trustees in relation to the organization of the town of Memphis, Missouri, into a city of the fourth class. That is headed January 20, 1880, as follows:

Proceedings of the town board of trustees in relation to the organization of the town of Memphis, Mo., into a city of the fourth class.

JANUARY 20TH, 1880.

The board of trustees of the town of Memphis met at the call of the chairman—members all present—at which meeting, among other, the following proceedings were had, to wit:

The petition of citizens of said town asking for an election on the question of organizing the town into a city of the 4th class was presented and filed, and, on motion of Mr. Craig, the consideration of the petition was deferred until Jan. 22, 1880.

L. MOTT, *Ch'n.*

J. M. PENNY, *Clerk.*

45 JANUARY 22, 1880.

Board met pursuant to adjournment—members present, Mott, Craig, Donnell, Payne, and Penny—when, among other, the following proceedings were had, to wit:

The consideration of the petition of citizens praying an election to be held to vote upon the proposition of organizing the town of Memphis into a city of the 4th class was taken up, and, on motion, it is ordered that an election be held as prayed for in said petition, and that such election shall be held on Tuesday, the 17th day of Feb., A. D. 1880.

L. MOTT, *Ch'n.*

J. M. PENNY, *Clerk.*

MARCH 12, 1880.

Board met pursuant to adjournment—members present, Mott, Payne, Craig, Donnell, and Penny—when, among other, the following proceedings were had, to wit:

On motion of J. P. Craig, the following ordinance was unanimously adopted:

Whereas, as it appears that a majority of the voters of the town

of Memphis have voted that said town be organized as a city of the 4th class, under the general law of Missouri, now, for the purpose of fully organizing said town as a city of the 4th class, it is ordered that said town be, and the same is hereby, declared a city of the 4th class as aforesaid; and said town being now declared a city of the 4th class, it is hereby ordained by the board of aldermen of said city of Memphis that said city be divided into two wards, as follows:

The line separating said wards shall begin at a point on the north line of said city where the same is intersected by a line running through the middle of Main street north and south, and running thence in a southernly direction through the middle of Main street in a straight line to the south boundary of said town or city.

46 It is further ordained that all that part of said city lying east of said line shall be known as the first ward and that all lying west of said line shall be known as the second ward.

And it is further ordained that the following-named persons are appointed as a board to hold an election in the several wards, on the first Tuesday in April, 1880, to elect officers for the city of Memphis, to wit: W. C. Chenault, A. H. Pitkin, J. B. Patterson, and James Whalon, for the first ward, and D Witherspoon, L. W. Rechard, J. H. Clemons, and J. T. Board, for second ward.

L. MOTT, *Chairman.*

J. M. PENNY, *Clerk.*

MEMPHIS, MO., *April* 13, 1880.

Board met to canvass the vote cast at the election for city officers held April 6th, 1880.

Members present: J. B. Donnell, Phillip Payne, and J. M. Penny, Mayor Mott being absent.

On motion, J. B. Donnell was elected mayor *pro tem.*, when, among other, the following proceedings were had, to wit:

After a careful examination of the poll books of the several wards the following persons were declared elected, to wit:

S. C. Knott to the office of mayor; L. E. Byrne to the office of marshall; J. M. Penny to the office of alderman of the first ward for two years, and Phillip Payne to the office of alderman of the same ward for the term of one year; W. Hudson to the office of alderman of the second ward for the term of two years, and C. R. Combs to the office of alderman of the same ward for the term of one year.

Therefore certificates of election were issued to each of the above-named persons, who now come, take, and subscribe to the following oath:

47 "We do solemnly swear that we will support the Constitution of the United States and the constitution of the State of Missouri, and that we possess all the qualifications required by the

laws governing cities of the 4th class, and that we will demean ourselves faithfully in office.

S. C. KNOTT.
C. R. COMBS.
PHILLIP PAYNE.
J. M. PENNY.
W. HUDSGN.
L. E. BYRNE."

Subscribed and sworn to before me this 13th day of April, A. D. 1880.

C. S. MARTIN,
Circuit Clerk,
Per E. M. ALLEN,
Deputy Clerk.

I, J. M. Penny, clerk of the board of aldermen of the city of Memphis, Mo., hereby certify the above and foregoing to be a true copy in substance of the proceedings of the board of trustees of the town of Memphis in relation to the organization of said town as a city of the 4th class as the same appears on the records of said town.

Given under my hand and the seal of said city June 15th, 1880.

[L. S.] J. M. PENNY, *Clerk.*

Mr. CUNNINGHAM: I merely desire to note an objection that this don't show an instrument made by a corporation known as the inhabitants of the town of Memphis and known under our statutes to be the kind of a town to be incorporated by a county court. This vote and these certificates in this pamphlet before me certify to the organization of a corporation called the town of Memphis into a city, and I claim it is the duty of the plaintiff to establish formally that there existed a town known as the "Inhabitants of the
48 Town of Memphis," or, even if he claims that they are identical, that he should establish that fact and show that there was a corporation known as the town of Memphis; in other words, you have to establish the fact that there was a town before there was a city, and therefore it is incompetent and irrelevant testimony.

The COURT: I will take it subject to exceptions.

Mr. OVERALL: I wish to get at the history of the matter.

The COURT: That is proper.

Mr. OVERALL: I desire to introduce the following record of the proceedings of the board of trustees of the town of Memphis, dated January 26th, 1871, as follows:

JANUARY 26TH, 1871.

Special meeting of the board of town trustees called by the president, H. H. Byrne.

Present: H. H. Byrne, George W. Stine, Henry D. Wellington, Loam Mott, Phillip Payne—all the members.

On motion, S. W. Birch was elected secretary *pro tempore*, Mr. William T. Kays being absent and sick.

On motion of Geo. W. Stine, a special election was ordered by the board of trustees, to be held on Tuesday, the 7th day of February, 1871, to vote on the following proposition submitted to the town by the Missouri, Iowa and Nebraska Railway Company, to wit: Said company agrees to construct and build a railroad from the town of Alexandria, in Clarke county, in said State of Missouri, to the town of Memphis, in Scotland county, in said State, upon conditions that the said town of Memphis shall subscribe stock in said company to the amount of thirty thousand dollars, payable in town bonds drawing 8 per cent. per annum from date of issue, and delivery of said bonds to said railway company, payable annually, due in twenty years, provided, however, the above proposition shall not be binding on said town of Memphis unless the said railway company shall have completed their railroad and the cars running thereon
49 and a depot permanently located and built within one-half of one mile from the court-house in said town of Memphis on or before the 1st day of January, 1872.

On motion, it was ordered that tickets to be used at said election shall be written or printed as follows, to wit: "Shall the town of Memphis subscribe stock to the amount of $30,000.00 in the railroad company?" Those voting for said proposition to write "Yes" on their tickets; those voting against to write "No" on their tickets.

On motion, the chairman of the board of trustees was instructed to procure tickets printed on the best possible terms.

On motion, Henry D. Clapper, Lee Davis, and J. T. Walker were appointed judges of said special election, and they were instructed to give notice of the same and the object of the same by posting six handbills in the town of Memphis.

On motion, meeting adjourned.

H. H. BYRNE, *Chairman.*

S. W. BIRCH,
Clerk pro tempore.

* * * * * * *

I, J. M. Penny, city clerk of the city of Memphis, in Scotland county, Missouri, being a city of the 4th class, formed from the former town of Memphis, in said county, do hereby certify that I am the custodian of the records of the said town of Memphis, in Scotland county, Missouri, and that the foregoing is a full, true, and correct transcript from said records in relation to said election as the same is of record in my said office.

Witness my hand and seal of the city of Memphis this Sept. 5th, 1882.

[SEAL.] J. M. PENNY,
City Clerk.

50 Mr. CUNNINGHAM: I make the same objection which I made at the previous trial, on the ground of incompetency and irrelevancy.

Mr. OVERALL: I will read the certificate when I get through.

The COURT: This is all subject to exceptions. I cannot pass upon them piecemeal.

Mr. OVERALL. The certificate is appended to the records; but I will read the records through, as they are continuous and on the same piece of paper, and then I will read the certificate afterwards. I will now read the proceedings of—

"*Special Meeting of the Board of Trustees of the Town of Memphis, Scotland County, Mo.*

Meeting of the board of trustees, held on the 16th day of February, 1871.

FEBRUARY 16, 1871.

Members of the board all present, to wit: H. H. Byrne, H. D. Wellington, George W. Stine, Loam Mott, Philip Payne.

On motion George W. Stine, S. W. Birch was elected secretary *pro tempore;* William T. Kays, secretary, absent.

On motion of George W. Stine, seconded by Mr. Payne, the following order was adopted by the board of trustees, to wit:

Whereas it was on the 26th day of January, A. D. 1871, ordered by the board of trustees of the town of Memphis, Scotland county, Missouri, at a special meeting called for that purpose by the chairman, that a special election be held on the 7th day of February, 1871, in the town of Memphis aforesaid, at which election the following proposition to said town by the Missouri, Iowa and Nebraska Railway Company would be submitted to the voters of said town of Memphis, to wit: The said railway company agrees to construct and build a railroad from the town of Alexandria, in Clarke
51 county, in the State of Missouri, to the town of Memphis, in Scotland county, in said State, upon conditions that the said town of Memphis shall subscribe stock in said corporation to the amount of thirty thousand dollars, payable in town bonds drawing eight per cent. interest per annum from date of issue, payable annually, due in twenty years, provided, however, the above proposition shall not be binding on said town of Memphis unless the said railroad shall have been completed and the cars running thereon to a depot permanently located and built within one-half of one mile of the court-house in said town of Memphis on or before the 1st day of January, 1872;

And whereas, at said special meeting of the board of trustees as aforesaid, Henry D. Clapper, Lee Davis, and James T. Walker were appointed judges of said special election and instructed and ordered to give notice of the time, place, and for what purpose the said special election would be held by posting six handbills or notices in six public places in the town of Memphis aforesaid not less than ten days nor more than twenty days before said special election;

And whereas it was ordered at said special meeting that the tickets to be used by the voters of the said town of Memphis in said election should be written or printed as follows, to wit: 'Shall the town of Memphis subscribe stock to the amount of thirty thousand dollars

in the M., I. & N. Railway Company?' Those voting for the proposition to have written or printed on their tickets 'Yes,' and those voting against the proposition 'No;'

And whereas it appearing to the board of trustees of the town of Memphis that the said notice of the said special election was duly given by said judges of election, in accordance with our order as aforesaid and the law in such cases made and provided; and
52 it further appearing to us that, in accordance with an act to provide for the registration of voters at special elections, sec. 18, approved March 21st, 1868, the clerk of the county court did cause to be delivered to the officer of registration the books of registration, and a special registration was made in said town of Memphis by said officers of registration in accordance with the provisions of the constitution and of said act, and the said special election was duly held on the 7th day of February, 1871, at which election the said way's proposition as above described was duly submitted to the voters as aforesaid of the town of Memphis; and at said election there were one hundred and thirty-five votes cast in favor of the said town of Memphis subscribing stock as aforesaid to said railway company and only one against said proposition; and it further appearing that at said election more than two-thirds of the qualified voters of the said town of Memphis were cast and were in favor of said subscription:

Therefore, in consideration of the aforesaid premises and by virtue of the law and the power therein granted to us as trustees as aforesaid of the town of Memphis to subscribe stock in said railway company, it is hereby ordered by the board of trustees of the town of Memphis aforesaid that the said town of Memphis, in the county of Scotland, in the State of Missouri, do hereby subscribe the sum of thirty thousand dollars to the capital stock of the Missouri, Iowa and Nebraska Railway Company, payable in the bonds of said town of the denominations of one thousand dollars each, due twenty years from date of issue and bearing eight per cent. interest per annum, the interest payable annually, in the city of New York, to the Farmers' Loan and Trust Company, on the terms and conditions following:

Said thirty thousand dollars in bonds as aforesaid to be delivered to said railway company when said railroad shall have been
53 graded, bridged, and tied and the track laid and the cars running thereon from the town of Alexandria, in Clarke county, in the State of Missouri, to a permanent depot located, established, and built within one-half mile of the court-house, in the town of Memphis, in the county of Scotland, and in the State of Missouri, provided said railroad shall be built and the cars running thereon, as aforesaid, on or before the 1st day of January, 1872; otherwise said subscriptions shall be null add void.

And it is further ordered that Henry M. Gorin be, and he is hereby, appointed agent for said town of Memphis to subscribe the stock of said town of Memphis upon the books of said company, to represent said town at the meetings of the stockholders of said com-

pany, to cast the vote of said town, and to secure its dividend in said stock so submitted to said company.

And in order that the interests of the people of the said town of Memphis may be fully guarded the board of trustees of the town of Memphis do hereby appoint as trustee Charles Mety, of said county of Scotland, whose duty it shall be to receive from the clerk of the town of Memphis aforesaid the above-mentioned bonds as soon as the same are issued and to have custody of the same, and as soon as the said railway company shall have complied with the stipulations above set forth in said order the said trustee shall deliver the aforesaid bonds to the treasurer or other authorized agent of said company an equal amount in certificates of stock of the said railway company, which said certificates of stock the said trustee shall deposit in the hands of the treasurer of the town of Memphis, in Scotland county aforesaid, taking his receipt for the same, which said receipt, together with a written report of his action, shall be presented to the board of trustees of the town of Memphis at the
54 next regular meeting of said board thereafter, and the said agent or trustee shall give bond in the sum of fifty thousand dollars to the said town of Memphis, with security to be approved by the said board of trustees, for the safe keeping of said bonds and the faithful performance of the trust.

And it is further ordered that the att'y for said town of Memphis shall proceed to have said bonds printed and lithographed, and that the chairman of said board of trustees shall sign the same and the clerk of said town of Memphis shall make the proper attestation of his signature in writing, and that the said bonds shall have annual coupons for interest attached thereto. It is further ordered that said Charles Mety, trustee as aforesaid, shall detach any coupons that may have passed maturity; and the said trustee shall cancel and return the same to the treasurer of said town of Memphis when his report as aforesaid is made and shall enter upon the next maturity coupon on said bonds the date of delivery of said bonds to said company in order that said company shall receive interest only from date they are entitled to receive said bonds.

It is further ordered and provided *and provided* that said company shall pay all expenses of lithographing and printing said bonds.

This 16th day of February, 1871.

H. H. BYRNE, *Chairman.*

S. W. BIRCH,
Clerk pro tempore.

On motion, the meeting adjourned.

H. H. BYRNE, *Chairman.*

S. W. BIRCH.
Clerk pro tempore.

55 Pursuant to a call of the chairman of the board of trustees, the board met at the office of William T. Kays March 28th, 1871. Present: Mr. Byrne, Mr. Payne, and Mr. Wellington.

I, the undersigned, clerk of the city of Memphis, Scotland county,

Missouri, attest the above as a true copy of the town records for the year and date above written.

Sept. 5, 1882.

J. M. PENNY, *City Clerk.*"

Mr. CUNNINGHAM: I make the same objection.

Mr. OVERALL: The seal of the city is attached. This is the certificate:

"I, J. M. Penny, city clerk of the city of Memphis, in Scotland county, Missouri, being a city of the 4th class, formed from the former town of Memphis, in said county, do hereby certify that I am the custodian of the records of the said town of Memphis, in Scotland county, Missouri, and that the foregoing is a full, true, and correct transcript from said records in relation to said election as the same is of record in my said office.

"Witness my hand and seal of the city of Memphis this Sept. 5th, 1882.

"J. M. PENNY, *City Clerk.*"

(With the seal of the city attached.)

Mr. CUNNINGHAM: I make the same objection.

WILLIAM T. KAYS, sworn and examined, testified as follows:

(By Mr. OVERALL:)

Q. Mr. Kays, I wish to hand you this instrument and have you examine it and examine the signatures before asking any questions.

(Bond handed to witness.)

56 Mr. CUNNINGHAM: I do not understand it is offered in evidence.

Mr. OVERALL: Oh, no; it is just shown.

Q. State your name in full?

A. William T. Kays.

Q. Where do you reside, Mr. Kays?

A. I reside in the city of Memphis, Missouri, Scotland county.

Q. How long have you resided there?

A. I have resided there since 1862, with the exception of a short time that I was away in military service.

Q. Have you ever occupied any office in the town of Memphis?

A. Yes, sir; I was clerk of the board of trustees of the town of Memphis in 1871, as I recollect now—that is from, I think, the spring of 1870 to the spring of 1871.

Q. Some time in the spring of 1871?

A. Yes, sir.

Q. Were you such clerk on the first day of March, 1871?

A. I think I was, sir.

Q. I will get you to examine that paper that you have before you?

A. I have examined it.

Q. State whether that is your signature as clerk of the board of trustees for the town of Memphis.

A. It is, sir.
Q. Is that the seal of the town attached there at the right hand?
A. I think so, sir. It appears to be.
Q. Were you acquainted with H. H. Byrne at that time?
A. Yes, sir.
Q. What position did he occupy to the town of Memphis?
A. He was a member of the board of trustees of the town of Memphis and chairman of the board at that time.
Q. Have you ever seen him write?
A. Frequently.
Q. Do you know his signature?
A. I think so, sir.
Q. Examine his signature on that instrument and say whether that is his signature?

57 A. That is his signature I have no doubt of it, because he and I signed this at the same time or about the same time, and I think I probably saw him sign it, at least I am satisfied it is his signature.

Mr. OVERALL: Now I understand that you do not require us to go through all these bonds?
Mr. CUNNINGHAM: I am willing that this testimony shall apply without going through all of them.
Mr. OVERALL: It is considered that the same testimony shall be taken as submitted in regard to all of the bonds.

Q. That is bond 4 is it not?
A. I did not notice the number.
The COURT: This is bond No. 4. The only point is that the witness proves the signature to all these bonds as he states.
Mr. CUNNINGHAM: And it is understood that he will give the same testimony as to each and every bond described in the petition.
Mr. OVERALL: Yes, and I will not call them out.

The said bond No. 4 is in the words and figures as follows:

UNITED STATES OF AMERICA.

Number 4. Dollars, 1,000.

Eight Per Cent. Railroad Bond.

Twenty Years.

TOWN OF MEMPHIS, *County of Scotland:*

Know all men by these presents that the Town of Memphis, in the county of Scotland, in the State of Missouri, acknowledges itself indebted to the Missouri, Iowa and Nebraska Railway Company, "a corporation, existing under and by virtue of the

58 laws of the States of Missouri and Iowa, formed by consolidation of the Alexandria and Nebraska City Railroad Company (formerly Alexandria and Bloomfield Railroad Company) of the State of Missouri, and the Iowa Southern Railway Company of

the State of Iowa, in the sum of one thousand dollars, which sum the said Town hereby promises to pay to the said Missouri, Iowa and Nebraska Railway Company or bearer, at the Farmers' Loan & Trust Company, in New York, on the first day of March, A. D. 1891, together with interest thereon from the first day of March, 1871, at the rate of eight per cent. per annum, which interest shall be payable annually, in the city of New York, on the first day of March in each year, as the same shall become due, on the presentation of the coupons hereto annexed—

This bond being issued under and pursuant to an order of the board of trustees of the town of Memphis for subscription to the stock of the Missouri, Iowa and Nebraska Railway Company, as authorized by an act of the General Assembly of the State of Missouri entitled "An act to incorporate the Alexandria and Bloomfield Railroad Company," approved February 9th, 1857.

In testimony whereof the said Town of Memphis has executed this bond by the chairman of the board of trustees of said town under the order of said board of trustees, signing his name hereto, and the clerk of said board of trustees, under the order thereof, attesting the same and affixing thereto the seal of said board.

This done at the town of Memphis, in the county of Scotland, in the State of Missouri, this first day of March, A. D. 1871.

[Seal Town of Memphis, Scotland Co., Missouri.]

H. H. BYRNE,

Chairman of the Board of Trustees of the Town of Memphis.

Attest: WILLIAM L. KAYS, *Clerk.*

59 All other bonds are in same language, except the numbers thereof.

Cross-examination by Mr. CUNNINGHAM, counsel for the defendant:

Q. You have stated that you and Byrnes signed these bonds at the same time?

A. About the same time.

Q. What was that time—what was the date at which you signed them?

A. Well, it is impossible for me to give the exact date, but it was just as I now recollect it after 15 years' time has elapsed, and, as I now remember, it was just a short time before our term of office expired as trustees.

Q. Can you fix the date?

A. Well, it was, I judge, in the month of April.

Q. In the early or latter part of April?

A. I would say that we went out about the 24th of April, from the records.

Q. You know that to be a fact?

A. I think it was a very short time before we ceased to be office-holders that we signed these bonds.

Q. You think you signed it the 24th of April, 1871?

A. Possibly a day or two before that; I am not positive, but not long before.

Q. Mr. Kays, you have stated that you were secretary during the years of 1870 and 1871. Were you secretary at the time these orders read in evidence by Mr. Overall were made, on the 26th of January, 1874?

A. I think I was secretary at that time.

Q. Did you enter those orders on the books of the town or city?

A. No, sir.

Q. Do you know anything in reference to the entry of these orders on the books at that time?

A. Well, yes; I know something about it.

60 Q. State how they came to be there, and when.

A. I was sick myself, and wasn't present at the time that the order for the election was made; neither was I there at the time when the order ratifying—that is, what purports to be the order there ratifying—or rather ordering the issue of the bonds to be made. I wasn't there, I think, at that time. I saw the record. The record was in my custody all the time—in my office. Samuel W. Burch was an attorney there, and he wrote up—prepared this record and wrote it up.

Q. He prepared and wrote it up where?

A. On the books of the city or town.

Q. You identify this as the record about which you are testifying? (Record shown.)

Mr. OVERALL: That is a certified copy.

Q. I say you identify these copies of the record you have testified to?

A. I have not read them.

Q. You have heard them read?

A. I have heard them read; sounds very much like it.

Q. I do not wish to waste time. I wish to know whether you testify that the orders you hold in your hand and have heard read were entered on the books of the town by yourself or Mr. Burch. I understood you to say Mr. Burch entered them. I ask you now to state when he entered them; about what date.

A. Well, the order directing the bonds to be issued, finding an election had been held, purports, I think, to have been made on the 24th of March. I can't tell when this began and left off.

Q. I think I can abbreviate your labors if you will permit me to ask the question. Did you ever enter on the records of the town of Memphis any order requiring an election of the voters of said town to vote upon a subscription of stock to the Missouri, Iowa & Nebraska Railway Company?

61 Mr. OVERALL: I object. That does not purport to have been entered by him.

The COURT: No; all you are after is the dates.

Mr. CUNNINGHAM: I desire to bring the recollection of the witness to what I desire to ask.

The COURT: This corporation speaks by the records, of course.

Mr. CUNNINGHAM: The record don't purport to have been written by him. It says he was absent and a *pro tempore* clerk was appointed.

The COURT: What is the date of that order?

Mr. CUNNINGHAM: The 26th of January, 1871, and the other the 16th of February, 1871.

Mr. CUNNINGHAM: What I wish to ask and what I desire to save exceptions to, if not permitted to ask the question, is this:

Q. Did you ever, as secretary of that board, enter any order of that kind?

A. I never did.

Mr. OVERALL: We object to that, because the record shows that he was absent at the date this was written.

The COURT: That is only strengthening your record.

Q. If you did not make such a record do you know of anybody who made such an entry as that on those books? And, if so, tell all you know about it.

A. I do know that the entry was made there by Mr. Burch in my office in my presence. It wasn't made, however, on the day it purports to have been made. It was written up some time afterwards.

Q. When?

A. Well, not long before we ceased to be officers?

Mr. OVERALL: Sir?

A. It was written up not long before we ceased to be offi-
62 cers of the board. There was an outline of that order that was prepared by somebody. I don't know who, and I have it, I guess, in my office now, word for word, and it lay there for some time, and was amended and finally written up some time after the date that purports to be there.

Q. About how long?

A. That I can't say—how long, but several weeks, I judge.

Q. You say Mr. Burch wrote that up in the book?

A. Yes, sir; I do.

Q. Do you know anything about any alteration that he made in the order which he brought up there to be entered in that book? And, if so, state.

Mr. OVERALL: I object. The question is, what is the record of the board, not what were the minutes, which may have been corrected.

The COURT: He wants to impeach the record.

Mr. CUNNINGHAM: I wish to impeach the record, and I ask if you know of any change made in the phraseology of that order entered at that time? And, if so, state.

Mr. OVERALL: I think your honor does not understand it. I understand Mr. Cunningham to ask him was any change made in the order as it was entered on the record.

The COURT: As I understand the force of this it is simply this: At a given date, this party being absent, a substitute was appointed

and an order was made which was entered on the records possibly some days after.

Mr. OVERALL: Yes.

The COURT: Just as, for instance, the proceedings of this court. I never sign the record on the equity side of the docket until the end of the term, though I may have passed an order three months antecedent; but that don't affect the record; and what I suppose Mr. Cunningham is driving at is this: That the entry made of

63 record was not the order made by the court at all; that there was substituted a varied order. Is that it?

Mr. CUNNINGHAM: I wish to show when the order was brought there which Mr. Birch proposed to write on the books that it did not contain one word about a registration of voters in that town or about a majority of the electors in the township as it now reads. This witness testifies that in his presence those words were interpolated after a discussion of the fact upon that order.

Mr. OVERALL: Do you mean in the record or the minutes there?

Mr. CUNNINGHAM: In the skeleton order; that he says Birch came there with that paper, which he was going to enter up as the memorandum of what was done at those two meetings on the 26th of January, 1871, and the 16th of February, 1871, and in the conversation he had with him they discussed the effect, and that Birch interlined in the memorandum the words he afterwards put on the record, showing a registration, and that it did not contain such words prior to that.

The COURT: Who signed that record?

WITNESS: Mr. Birch signed it.

Mr. OVERALL: Mr. Birch, secretary *pro tem.* These gentlemen have the original record book in the court-room.

The COURT: That don't matter.

Mr. OVERALL: I wish to show to your houor that it is not pretended that there was any change on the record, but only in the minutes before they were put on the record—that is, the memorandum.

The COURT: I understand—the memorandum. This gentleman was sick, and his *pro tempore* substitute brought him a memorandum of what the board had ordered, and there it stands.

64 Q. State, Mr. Kays, as briefly as you can these facts that I have asked you to narrate.

A. Well, I have stated that the record was written up some time afterwards in my presence in my office by Mr. Birch. That record was signed by Mr. Byrne; also several records there at one time that he had omitted to sign were signed by him before he ceased to be an officer; I think all at one time. Now, in regard to that skeleton, if you want me to tell about that.

Q. Why, yes.

A. The skeleton record was brought there and Mr. Birch wanted me to write it up in the record, and we conferred—we talked about the fact of the registration and the number of votes that had been cast——

Mr. OVERALL: I object to all this.

The COURT: Let it go in; we will get through much more rapidly. It amounts to nothing, anyhow, in this case.

Mr. CUNNINGHAM: Go ahead.

WITNESS: And I suggested to him that there had been no registration, as I understood it, and the number of votes did not represent half the voters in the city, and so on, and I would not write up the record—didn't want to have anything to do with it, and he did write it up.

Q. I understand you to say you refused to write it up because it contained statements that you knew to be untrue in regard to the registration. Do you so state?

A. I didn't understand that there was any registration.

Q. And you objected on that account?

A. I objected on that account.

Q. Mr. Kays, do you know that Mr. Burch was an attorney for the Missouri, Iowa & Nebraska Railway Company at that time?

Mr. OVERALL: I object.

Q. Do you know of the fact of his being an attorney?

65 Mr. OVERALL: I object as immaterial.

Mr. CUNNINGHAM: I think it is of some importance, may it please the Court. I wish to prove who the man was that made that entry.

The COURT: I wish to know to what extent you wish to impeach the records.

Mr. CUNNINGHAM: I wish to show that it was made by an attorney of the Missouri, Iowa & Nebraska railway.

The COURT: Suppose it was; can't a railroad attorney tell the truth as well as anybody?

Mr. CUNNINGHAM: We have just shown that he didn't tell the truth. I wish to show the motive and that the witness wouldn't write it up because it wasn't true.

The COURT: Very well; leave it there, then.

Mr. CUNNINGHAM: I desire to ask the question, if your honor will permit me.

The COURT: Ask the question.

Q. I ask whether he wasn't the attorney for the Missouri, Iowa & Nebraska Railway Company?

A. Well, sir, I can't answer that question. I know he was very much interested in getting the railroad to Memphis, and he took a very active part in it, but whether he was an attorney for the company I can't say.

Mr. OVERALL: No more active than you were at that time; I don't mean now. "Circumstances alter cases."

WITNESS: Yes; I think he took a more active part than I did; a good deal.

Redirect examination by Mr. OVERALL, counsel for the plaintiff:

Q. Mr. Birch's name is S. W. Birch, isn't it?

A. Samuel W. Birch.

66 Q. You say you didn't sign these records because you thought there was something in them that hadn't occurred; is that it?

A. That is the reason I gave.

Q. What right did you have to sign those records if you were not there; what right did you have to sign these records if you were not there acting as clerk?

A. Well, I didn't have any right.

Q. Don't you know you didn't sign them because you didn't have the right to sign them, and because you were not acting as clerk at that time?

A. Well, sir, it is possible that may have been one reason.

Q. Did you think at that time that you had any right to write the record when you were not acting as secretary at the time?

A. Well, sir, I can't tell what I thought about it now.

Q. You can't? You can tell what you thought about registration. S. W. Birch was the man's name, wasn't it?

A. Yes, sir.

Q. And these records were signed by H. H. Byrne, chairman. He was the chairman, too, wasn't he?

A. He was chairman.

Q. And they were attested by S. W. Birch, clerk *pro tempore;* that is true, isn't it?

A. Yes, sir.

Q. Have you seen those records since you came here?

A. Yes, sir.

Q. Is there any interlineation on those records of any fact about registration or anything else?

A. I think not, sir.

Q. Have you any doubt of this being the true and genuine copy of those records as they were signed by the chairman of that board of trustees and attested by this clerk *pro tempore?*

A. No, sir.

67 Q. Now, in regard to these bonds, I will ask you whether there were attached coupons numbered from 1 to 20 as there are attached to this—the remainder not cut off, 15 to 20—at the time you signed them?

A. Well, sir, there was a lot of coupons attached, but the number I can't testify to now.

Q. In examining those bonds you will see, in colors, stamped on each coupon is the number, the numbers on this being from 15 to 20—coupons for annual interest that matured on them after the date of their execution.

A. Yes, sir; I do.

(By Mr. CUNNINGHAM:)

Q. Did I understand you in my cross-examination to say that Mr. Birch asked you to sign these records or to write up the body of the order on the books? Which did I understand you to testify?

A. My recollection is that he requested me to write it up—to copy it on the record, the skeleton order which had been prepared.

Q. Did I understand you to testify that you were at that time actually secretary at that time; that you were at that time actually secretary?

A. Oh, yes; I was actually secretary and had the custody of the book.

Q. And you declined to enter the order on the books because it stated facts that you believed to be untrue. Is that my understanding of the fact?

A. That is one reason, yes, that I didn't understand them to be that way.

(By Mr. OVERALL:)

Q. You didn't understand the fact to be that way?

A. As recited.

(By Mr. CUNNINGHAM:)

Q. And didn't you state in your cross-examination that the skeleton he brought when he came did not have the recital about the registration of a majority?

A. Not at first; no.

Q. And it was in your conversation that he interlined that?

A. Yes, sir.

68 Mr. CUNNINGHAM: That is all. You may stand aside.

The COURT: I understand Mr. Kays signed all these bonds and coupons?

Mr. OVERALL: Yes.

Mr. CUNNINGHAM: It is understood that this testimony shall apply to all of them.

The COURT: Certainly.

Plaintiff then called as a witness WILLIAM HILL, who, being duly sworn, testified as follows:

(By Mr. OVERALL:)

Q. (Paper shown to witness:) Mr. Hill, state what your name is?

A. My name is William Hill.

Q. Are you the plaintiff in this suit?

A. Yes, sir.

Q. Where do you reside?

A. Warsaw, Illinois.

Q. How long have you resided there?

A. My father settled there in 1836, and I have been there ever since.

Q. What business are you engaged in, Mr. Hill?

A. I am in the First Fational Bank.

Q. What position do you occupy in that bank?

A. President.

Q. How long have you been president of that bank?

A. Since September, 1864.

Q. I will ask you to look at that bond marked No. 4, which is identified by Mr. Kays, and say whether you brought it here?

A. I brought it here; yes, sir.

Q. Did you detach that coupon, No. 14, from that bond No. 4?

A. Yes, sir.

Q Did you detach the other coupons filed in this suit from
69 that bond, number 4, and from the various bonds in this suit? Did you do that individually or see it done in your presence?

A. I either did it individually or it was done in my presence—all done in my presence.

Q. You either did it or saw it done?

A. Yes, sir.

Q. And they were detached from these various bonds that you have produced here?

A. Yes, sir.

Q. State whether you are the owner individually of any of those bonds?

A. I am.

Q. How many of these?

A. I believe three I own individually.

Q. And who do the others belong to?

A. Ten of them belong to the First National Bank.

Q. And the other one?

A. There is one of them belongs to the heirs of the estate of Mr. George S. Knox.

Q. Your brother-in-law?

A. Yes, sir.

Q. How long have you owned any of these bonds?

A. Some of them for a good while; some of them not so long.

Q. How long is the shortest time you have owned them?

A. The last one I bought was right after we had the trial here, and got judgment on them—that is, a year or two years ago, I forget which.

Q. Two years ago?

A. One of them I bought from Coquard and one from Gaylord.

Q. And the others you owned before that?

A. Yes, sir.

Q. This First National Bank, I understand, is the First National Bank of Warsaw, and is located at Warsaw, where you live?

A. Yes, sir.

Q. In the State of Illinois?

A. Yes, sir.

Q. And Mr. Knox was a resident of that place also?

A. Yes, sir.

Q. Now state whether the city of Memphis paid interest
70 on those bonds, and if so, how long after they were first issued?

Mr. CUNNINGHAM: I object.

The COURT: Let him answer the question.

Mr. CUNNINGHAM: I contend that by the record only they should show that fact.

The COURT: I understand the party wishes to prove whether he received interest on the bonds.

Q. State whether you received interest paid on the bonds by the town of Memphis.

A. We collected—I am not certain whether one or two coupons.

Q. After they were first issued?

A. Of the first numbers after the issue.

The COURT: After they were issued—the first?

The WITNESS: The first coupons were numbered, and as they became due—I am not really certain whether it was one or two that was paid before any question was raised on them.

Q. State whether you collected any after a suit was brought in the circuit court of Scotland county.

Mr. CUNNINGHAM: We make the same objection. It is a record matter.

The COURT: That is a matter of record.

Q. Then after that did the town or city of Memphis, its successor, commence paying again?

A. My recollection is that they did.

Q. How many times after that did they pay you the interest on these bonds?

A. I really can't state that now.

Q. More than once?

A. I think so.

Q. At least once—you know it was that often?

A. Yes, sir.

Q. And more than that you don't know how many times it was?

A. I think it was more than once.

71 Mr. OVERALL: I suppose the same testimony may be taken in regard to each of the other coupons?

Mr. CUNNINGHAM: He has already sworn he cut off all the coupons.

The said coupon No. 14 from bond No. 4 is in words and figures as follows:

80. *Railroad Bond Coupon.* 80.

MEMPHIS, MO., *March 1st*, 1871.

The Town of Memphis, State of Missouri, will pay to the bearer, on March 1st, 1885, at the Farmers' Loan & Trust Company, in New York, eighty **14** dollars, being one year's interest on bond No. 4 for $1,000.

H. H. BYRNE, *Chairman.*

All other coupons are in same language except as to number and dates of maturity.

Cross-examination by Mr. CUNNINGHAM, counsel for the defendant:

Q. Mr. Hill, you have before you a bond which I suppose is the one you have been speaking of on which interest was paid. When was it possible for the first interest to be due on that bond?

A. Well, I can't see what the date of this bond is.

Mr. HUGHES: March 1st, 1871.

The COURT: The bonds and coupons run the same date.

Mr. CUNNINGHAM: The coupons were annual coupons, were they not?

A. Yes, sir.

72 Q. And it is true there could not have been any interest due on this bond before the first of March, 1872, isn't it?

A. That is my understanding of it.

Q. You do not pretend to say that you got any interest from anybody prior to the maturity of first-interest coupons on this bond?

A. No, sir.

Q. Nobody paid you before it was due?

A. No.

Q. Then it is certain you were paid by nobody any interest on that bond before the first of March, 1872; that is correct, isn't it?

A. Yes, sir.

Q. Now, I will ask you if you were paid at any time by the city of Memphis in part how you were paid the first and second coupons—in what manner they paid it?

A. I think we sent the coupons out to Memphis; I am not quite positive.

Q. How do you know the city paid it?

A. Well, I only know it by reason of the fact that we got the money for it; that is all.

Q. You don't know who paid the coupon that you sent to Memphis, only that the money came back?

A. Yes, sir.

Q. When you testify that the city of Memphis paid you, you infer that they paid because somebody paid the coupons when they were sent up there; isn't that a fact?

A. Well, I wasn't there to see the treasurer of the city pay it of course. I think I sent them to the bank in Memphis for collection.

Q. When did you buy the bonds in this suit except the last one that you mentioned that you bought since the former trial of this case? When did you buy the other bonds?

A. I bought them at different times.

Q. What did you pay for them?

Mr. OVERALL: I object, as immaterial.

The COURT: That is immaterial.

Mr. CUNNINGHAM: I wish to show the fact that he bought

73 them at a great sacrifice.

The COURT: Well, suppose he did.

Mr. CUNNINGHAM: And that was in itself a warning of the invalidity of the bonds.

The COURT: I sustain the objection.

Q. Were you a stockholder in the Missouri, Iowa & Nebraska Railway Company in 1871?

A. No, sir.

Q. Were you an officer of that road?

A. No, sir.

Q. Do you know whether or not S. W. Birch was an employé of that road as an attorney at that time?

A. I don't know.

Redirect examination by Mr. OVERALL, counsel for plaintiff:

Q. Is it not true, Mr. Hill, that the first two coupons you have fell due March 2nd, 1872, and on March 2nd, 1873, were paid by the Farmers' Loan & Trust Company of New York?

A. Well, I am not certain about that.

Q. Didn't you send your coupons to the Farmers' Loan & Trust Company of New York, and were they not paid by that company?

A. I am not right certain about that.

Q. What is your best recollection?

A. My best recollection is that we collected here from the bank, but as to where we sent them I am not certain.

The COURT: Where are they payable?

Mr. OVERALL: They are payable at the Farmers' Loan & Trust Company in New York.

(By Mr. CUNNINGHAM:)

Q. Don't you know it to be a fact that those bonds were not delivered for months after the date that appears on them and that you did not get the whole year's interest at all?

A. No, sir; I don't know that.

Q. You swear that you did get a whole year's, first coupon due on the first of March, 1872?

74 A. I don't say that; I say that we collected the first coupon. In fact, I don't remember now whether the whole or half coupon.

Q. You collected a part of that coupon when due?

A. Yes, sir.

WILLIAM T. KAYS, recalled on behalf of the plaintiff, testified as follows:

(By Mr. OVERALL:)

Q. Did the city of Memphis ever have any other railroad indebtedness than this for these bonds?

A. Not for these bonds.

Q. For any other bonds or any other railroad bonds?

A. Oh, yes; they had $200,000.

Q. The city of Memphis?

A. Oh, excuse me; the city of Memphis never has; the county of Scotland has; excuse me.

Q. Did the town of Memphis ever have any other indebtedness, bonded indebtedness, except this railroad indebtedness?

A. Not railroad indebtedness; not that I know of.

Mr. CUNNINGHAM: I object.

Q. They never issued any bonds to any other railroad except the Missouri, Iowa & Nebraska Railroad Company?

A. Not to my knowledge.

Q. You have lived there during the entire time?

A. Yes, sir.

Mr. OVERALL: I now desire to read the record of the board of trustees of the town of Memphis of the 24th of April, 1871:

"At a meeting of the board of trustees of the town of Memphis, on the 24th day of April, 1871, the following among other proceedings were had, to wit:

The bond of Charles Mety, as trustee under an ordinance of the town of Memphis, dated Feb'y 16, 1871, for fifty thousand
75 dollars is filed and ordered approved."

"At a meeting of the board of trustees in the office of the clerk of the town of Memphis, Mo., held on the 4th day of August, 1874, the following among other proceedings were had, to wit:"—

I will state to your honor I wish to show here that they levied for years a tax to pay the interest on these bonds—

"At a meeting of the board of trustees of the town of Memphis, on the 24th day of April, 1871, the following among other proceedings were had, to wit:

On motion of Best, the following amounts were levied on each one hundred dollars and all fractional parts thereof, to be taxed in the same proportion, according to valuation:

To pay interest on railroad bonds	$1 50
To pay current expenses	.15
For road and street purposes	5
Total levy per $100	$1 70

On motion of Hudson, the clerk was instructed to certify to the clerk of the county court the per cent. of the taxes levied.

On motion, it was agreed by the board that each citizen of the town that is subject to poll-tax shall pay the sum of two dollars.

And afterwards, to wit, on the 4th day of May, 1875, at a meeting of the aforesaid board of trustees the following among other proceedings were had, to wit:

The treasurer presented a statement of the receipts and disbursements for the fiscal year ending April the 7th, 1875, showing a balance in the treasury at that date as follows:

76	Railroad interest fund	3,535	69
	Contingent fund	210	82
	Road fund	34	74
	Total amount in treasury	3,781	25

And afterwards, to wit, on the 1st day of June, 1875, at a meeting of the aforesaid board of trustees, the following, among other, proceedings were had, to wit:

The treasurer was instructed to redeem all coupons belonging to railroad bonds due in 1873 and 1874 at any price not exceeding eight dollars for each coupon.

It was agreed that the following amounts of taxes shall be levied on each one hundred dollars of the assessed valuation of town property, all property valued at less than one hundred dollars to be taxed in the same proportion:

To pay interest on railroad bonds	$1 50
To pay current expenses	15
For road and street purposes	5
Total levy per $100.00	$1 70

And afterwards, to wit, on the 8th day of June, 1876, at a meeting of the aforesaid board of trustees, the following, among other, proceedings were had, to wit:

Now comes J. G. Best and presents the settle- of H. M. Gorin, col., in words and figures as follows:"

I call your honor's attention to the fact that part of the word "settlement" is left off.

H. M. Gorin, collector, in acc't with town of Memphis, Mo.

1875.		Dr.	Cr.
June 3.	To del. tax on lines prior to 1875	821 15	
	" tax of 1875, R. R. int. tax	3,946 12	
	" contingent town	395 26	
	" road	131 21	
		5,293 74	

77		Dr.	Cr.
1876.	Br't f'rd	5,293 74	
Feb'y 19.	By cash to J. G. Bur. T. R. R. int.	------	1,000 00
Mar. 9.	" " " "	------	1,000 00
Mar. 15.	" " " "	------	1,000 00
June 6.	" " " "	------	526 68
June "	" " " contingent fund	------	353 18
" "	" " road "	------	93 74
" " "	road r'pts " "	------	23 65
" "	del'q't tax prior to 1875	------	60 98
		------	4,058 23
"	del. personal tax prior to 1875	------	760 17

June —. By del. levy 1875, R. R. int. tax	------	419 44
" " " " cont'ng'nt	------	42 08
" " " " road	------	13 83
	5,293 75	5,293 75

And afterwards, to wit, on the 1st day of August, 1876, at a meeting of the aforesaid board of trustees, the following, among other, proceedings were had, to wit:

For the purpose of raising the necessary funds to defray the current expenses of the town of Memphis for the fiscal year ending May, 1877, it is hereby ordered that a tax be, and the same is hereby, levied on all taxable property in the town of Memphis as follows, viz: One dollar on the one hundred dollars, to be known as the railroad interest fund, and fifteen cents on the one hundred dollars, to be known as the contingent fund, and five cents on the one hundred dollars, to be known as the road fund, in all, one dollar and twenty cents on the one hundred dollars.

And afterwards, to wit, on the 10th day of April, 1877, at a meeting of the aforesaid board of trustees, the following,
78 among other, proceedings were had, to wit:

The following was ordered to be recorded:

Financial Statement.

Receipts:	Dr.	Cr.
Balance in treasury at last annual settlement	------	$694 07
Rec'd of H. M. Gorin, col., on tax book prior to 1876	------	1,034 58
Rec'd of H. M. Gorin, col., on tax book, 1876	------	138 69
" W. H. Perkins, former marshal	------	35 00
" W. S. Work, marshal, for licenses and fines	------	790 51
		$2,692 85

Disbursements:	Dr.	Cr.
Br't for'd	------	2,692 85
Railroad int. paid	1,126 33	
Warrants	1,259 54	
Bal. in treasury for year ending Apr. 16, 1877	306 98	
	2,692 85	
Tax book, 1876, amount	------	2,915 94
Am't collected by H. M. Gorin on tax book, 1876, as above	138 69	
Am't collected on t. book, '76, in hands W. S. Work, col.	2,209 04	
Am't delinquent tax, 1876	568 21	
	2,915 94	

Which balance the amount on the tax book.

ELIAS SCHOFIELD,
Chairman of Town Board.

79 Mr. OVERALL: I shall not read the next proceeding. We may introduce that in the record.

Mr. CUNNINGHAM: You must read if it is to be introduced.

Mr. OVERALL: I will read it.

Mr. CUNNINGHAM: I make the same objection.

Mr. OVERALL: If you object, then I will not read it. I will read it:

And afterwards, to wit, on the 11th day of May, 1877, at a meeting of the aforesaid board of trustees, the following, among other, proceedings were had, to wit:

On motion of J. P. Craig, it is hereby ordered that Elias V. Wilson and William W. Cover be, and that they are hereby, employed and authorized to represent the inhabitants of the town of Memphis and the trustees of said town in certain causes now pending in the Scotland county circuit court, entitled The State of Missouri at the relation of John D. Smoot, prosecuting attorney, plaintiff, against E. Schofield and others, trustees.

And afterwards, to wit, on the 14th day of July, 1877, at a meeting of the aforesaid board of trustees, the following, among other, proceedings were had, to wit:

The minutes of the proceedings of the board at its past meetings were read and approved.

The amount of taxes levied on each one hundred dollars of valuation of taxable property within the town limits is as follows:

For railroad interest fund	$1 00
For contingent fund	20
For the road and bridge fund	5
Total amount levied on each $100	$1 25

And afterwards, to wit, on the 22nd day of April, 1878, at a meeting of the aforesaid board of trustees, the following,
80 among other, proceedings were had, to wit:

On motion, the chairman appointed J. P. Craig to investigate and find out where and in whose hands the subscription stock of $30,000 in the M., I. & N. R'w'y Co., taken by the town of Memphis at a special election submitted for that purpose, Feb'y 7th, 1871, —.

On motion, meeting adjourned to meet 1st Tuesday in May (the 7th), 1878.

And on the 20th of August, at a meeting of the aforesaid board of trustees, the following financial statement was ordered to be placed of record:

1878.			
M'ch 1st.	Cash in treasury	50 92	
	Rec'd of col. from taxes	2,734 54	
	" " marshal, fines & licenses	340 25	
	Expended on streets, cash		167 94
	Expended for sundries and contingent fund		610 69
	Expended for coupons on R. R. bonds		2,160 84
1878.			
Sept. 1st.	Bal. in treasury		186 24
		$3,125 71	$3,121 71

MEMPHIS, MO., *Feb'y 4th*, 1879.

Board of trustees for town of Memphis met in regular session this evening, at office of chairman, in the court-house, all the members of said board being present. The minutes of the previous meeting read and approved, the following business was disposed of, to wit:

J. W. Barnes presents an offer from A. Bridgmer to take 50 cents on the dollar for town bond #10, $1,000, and five coupons of $80.00 each, last coupon being due March the 1st, '79; total bond and five coupons, $1,400. Moved and seconded that the above order
81 be accepted. Ordered to draw on treasurer to pay same, viz:

Railroad int. fund	94 38
Sinking fund	605 62
Am't in full, as per offer	$700 00

And afterwards, on the 5th of April, 1879, at a meeting of the aforesaid board of trustees, the following, among other, proceedings were had, to wit:

On- town bond, with coupon due March 1st, 1879, aggregation $1,080.00, having been offered for the sum of $650, moved that the offer be accepted by the board of trustees and warrants be drawn in payment therefor as follows: On- warrant on sinking fund in the sum of $349.08, being the balance on hand in that fund, and one warrant on the contingent fund in the sum of $300.92, the two warrants aggregating the above-mentioned sum, $650. Motion carried, and warrants ordered on treasurer for same.

And afterwards, to wit, on the 7th day of Oct., 1879, at a meeting of the aforesaid board of trustees, the following, among other, proceedings were had, to wit:

The chairman is authorized to receipt to Chas. Mety, Esq., for the stock in the M., I. & N. R. R. belonging to the town of Memphis, and to trade or exchange the same for bonds held by parties in Warsaw, Ill.

STATE OF MISSOURI, *Scotland County:*

I, J. M. Penny, clerk of the city of Memphis, in Scotland county, Mis-

souri, being a city of the fourth class, formed from the town of Memphis, in said county, do certify that I am the custodian of the records of said town of Memphis, and that the foregoing transcript is a correct,
full, and true copy of the proceedings of the trustees of said
82 town in reference to the matters therein contained as the same appears upon the records of said town now in my possession.

Witness my hand and the seal of said city of Memphis this 9th day of April, 1883.

[SEAL.] J. M. PENNY.

Mr. CUNNINGHAM: I object to all this as incompetent and irrelevant, but it may be taken by the court subject to exceptions.

The COURT: In the records last read there is a proposition for compromise, as I understand it; and, if so, of course, that is not competent.

Mr. OVERALL: We next offer in evidence the record of John T. Thomas against The Town of Memphis, and I suppose we may consider that read.

The COURT: Is this a mandamus proceeding?

Mr. OVERALL: No, sir; it is a suit on this very bond in the circuit court of Scotland county, Missouri, and a judgment of that court on this very bond with the——

The COURT: Is it a complete transcript?

Mr. OVERALL: A complete transcript of the record; yes, sir.

Mr. CUNNINGHAM: I object as incompetent and irrelevant.

Mr. OVERALL: We want to show this transcript of a judgment of their own court and that they paid the coupons described in this record.

The COURT: It can come in subject to exceptions to be passed on at the proper time.

The transcript is as follows:

STATE OF MISSOURI, } ss:
County of Scotland, }

Be it remembered that on the 22nd day of April, 1874, the
83 following petition was presented to Hon. E. V. Wilson, judge of the 4th judicial circuit of Missouri, in vacation, at chambers, to wit:

Transcript in Case of John T. Thomas vs. The Trustees of the Town of Memphis.

In the Circuit Court of Scotland County.

JOHN T. THOMAS, Plaintiff,
against
THE TRUSTEES OF THE TOWN OF MEMPHIS, Defendants.

To the Honorable Elias V. Wilson, judge of the circuit court of the fourth judicial circuit of Missouri:

Your petitioner, John T. Thomas, hereby complaining, shows that the defendant is a corporation duly organized and existing under

the laws of the State of Missouri, known as The Trustees of the Inhabitants of the Town of Memphis, and by such name has power to sue and be sued, plead and be impleaded in all courts of law and equity, and is situate and located in the county of Scotland and State of Missouri.

That in its corporate capacity the said town of Memphis did, on the 16th day of February, 1871, in the manner and upon the terms authorized by the laws of the State of Missouri, subscribe to the capital stock of the Missouri, Iowa and Nebraska Railway Company, a corporation duly organized and existing under the laws of the States of Missouri and Iowa, three hundred shares of stock in the sum of one hundred dollars per share, and in payment thereof did duly make, execute, and deliver to said Missouri, Iowa and Nebraska Railway Company thirty bonds of said town, duly executed and signed by H. H. Byrne, the chairman of the trustees of said town, and authenticated by the corporate seal of said town, which said bonds were dated and issued on the 1st day of March,
84 1871, and were of the denominations of one thousand dollars each, due in twenty years from date, and payable at the bank of the Farmers' Loan and Trust Company, in the city of New York, with eight per cent. interest from date, and numbered consecutively from one to thirty, to each of which said bonds were attached twenty interest coupons, numbered consecutively from one to twenty, in the sum of eighty dollars each, and successively, according to their respective numbers, payable annually on the first day of March at the bank of said Farmers' Loan and Trust Company, in the said city of New York.

That the second and third maturing coupons attached to said bonds are now due and unpaid, and that the plaintiff, John T. Thomas, is the owner and holder of said matured coupons, except the coupons upon two of said bonds numbered 15 and 19, and that in accordance with the terms expressed thereon has presented the same for payment at the said bank of said Farmers' Loan & Trust Company and demanded payment thereof, and payment thereof has been and still is refused.

That by virtue of the laws of this State conferring power upon the said town of Memphis to make subscriptions to said Missouri, Iowa, and Nebraska Railway Company, issue bonds and levy taxes for the payment thereof, it became the duty of the board of trustees of said town of Memphis to provide for the payment of said bonds so issued and interest coupons thereto attached as the same fell due by the levy and collection of such special taxes as might be necessary for that purpose upon the taxable property, as the same is made taxable by law for such purposes within the corporate limits of said town.

That said board of trustees has provided and made payment upon two of said bonds, to wit, on numbers 15 and 19, but has wholly
85 and wrongfully neglected to make any provisions whatever for the payment of said principal and interest coupons upon the remainder of said bonds, although as aforesaid authorized and required so to do.

That by reason whereof the said plaintiff has been and is unable to recover the amount of said coupons now and for a long time due.

That there is no adequate specific legal remedy afforded this plaintiff.

Wherefore, in consideration of the premises, plaintiff prays that the writ of mandamus may issue, directed to the members of said board now in office constituting the said board of trustees of said town of Memphis, commanding them, as such board of trustees of said town of Memphis, to levy and cause a to be collected a special tax sufficient to meet and pay said coupons and the interest accrued thereon or to make return and show cause why they neglect and refuse so to do, and for such other and further relief as he may in equity be entitled.

F. T. HUGHES AND
BLAND & BAKER,
Att'ys for Plaintiff.

Said petition was endorsed on reverse side as follows: "Presented to me in vacation at chambers and alternative writ issued this 22nd day of April, 1874.

E. V. WILSON, *Judge.*"

Filed Apr. 23rd, 1874.

CHAS. S. MARTIN, *Clerk.*

And thereupon said E. V. Wilson, judge as aforesaid, issued the following writ, to wit:

State of Missouri at the Relation of JOHN T. THOMAS, Pl't'ff,
86 *against*
THE TRUTEES OF THE INHABITANTS OF THE TOWN OF MEMPHIS, Def'ts.

The State of Missouri to John Garkey, Jos. G. Best, Elias Schofield, W. Hudson, & Thos. McCallister, trustees of the town of Memphis, Greeting:

Whereas it has been represented to me, the judge of the 4 judicial circuit of Missouri, that the def't is a corporation duly organized and existing under the laws of the State of Missouri, known as The Trustees of the Town of Memphis, and by such name has power to sue and be sued, plead and be impleaded in all courts of law & equity, and is situated and located in the county of Scotland and State of Missouri.

That in its corporate capacity the said town of Memphis did, on the 16th day of Feb., 1871, in the manner and on the terms authorized by the laws of the State of Missouri, subscribed to the capital stock of the Missouri, Iowa & Nebraska Railway Company, a corporation duly organized and existing under the laws of the State of Missouri & Iowa, three hundred shares of stock, in the sum of one hundred dollars each, and in payment thereof did duly make, execute, and deliver to the said M., I. & N. R. Way Co. thirty bonds of said town, duly executed and signed by H. H. Byrne, the chairman of

the trustees of said town, which said bonds were dated and issued on the 1st day of March, 1871, and were in the denomination of one thousand dollars each, due in twenty years from the date thereof, and payable at the Farmers' Bank Loan and Trust Company, in the city of New York and State of New York, with eight per cent. interest from date, and numbered consecutively from one to thirty, to each of which bonds were attached twenty inter-
87 est coupons, numbered consecutively from one to twenty, in the sum of eighty dollars each and successively according to their respective numbers, payable annually on the 1st day of March, at the bank of said Farmers' Loan and Trust Co., in said city of New York.

That the second and third maturing coupons attached to said bonds are now due and unpaid; that the pl't'ff, John T. Thomas, is the owner and holder thereof; that in accordance with the terms expressed therein has presented at the said bank of said Farmers' Loan and Trust Comp. and demanded payment thereof, and payment thereof has been and is refused; that by virtue of the laws of this State conferring power upon the said town of Memphis to make subscription to said Missouri, Iowa & Nebraska Railway Company, — issue bonds and levy taxes for the payment thereof, it became the duty of the board of trustees of said town of Memphis to provide for the payment of said bonds so issued and interest coupons thereto attached as the same fell due, by the levy and collection of such special *tax* taxes as might be necessary for that purpose upon the taxable property, as the same is made taxable by laws for such purpose within the corporate limits of said town.

That said board of trustees has provided and made payment upon two of said bonds, to wit, No-. 15 & 19, but neglected to make any provision whatever for the payment of principal or interest coupons; that by reason thereof the said pl't'ff has been and is unable to recover the amount of said coupons now and for a long time due; that there is no adaquate specific legal remedy offered this pl't'ff.

Now, therefore, being willing that full and speedy justice be done in the premises, I do command you, the said John Garkey, Joseph G. Best, Elias Scofield, W. Hudson, and Thomas McCallister; as
88 such trustees of the inhabitants of the said town of Memphis, to levy and cause to be collected a special tax sufficient to meet and pay off said coupons and the interest accrued thereon, or to make return to this writ on the 6th day of May, 1874, in the circuit court of Scotland county, and *and* on or before the 3 day of May term thereof, and show cause why you have not done so.

Witness my hand this 22d day of April, 1874, at chambers.

E. V. WILSON, *Judge.*

Filed April 23rd, 1874.

CHS. S. MARTIN, *Clerk.*

And on the same day the following summons was issued in said cause, to wit:

Summons.

STATE OF MISSOURI, } ss:
County of Scotland, }

In the Circuit Court.

The State of Missouri to the sheriff of Scotland county, Greeting:

We command you to summon Elias Scofield, John Gharky, Joseph G. Best, W. Hudson, Thomas McAllister, trustees of the inhabitants of the town of Memphis, if they be found in your county, to appear before our circuit court to be holden within and for the county of Scotland, at the court-house, in the town of Memphis, in said county, on the 6th day of May next, 1874, then and there before the judge of our said court, to answer the petition of the State of Missouri at the relation of the town of Memphis.

And have you then and there this writ with the return of your action thereupon.

89 Witness my hand as clerk of our said court and the seal thereof. Done at office in Memphis, in the county aforesaid, on the 23rd day of April, 1874.

[L. S.] CHS. S. MARTIN, *Clerk.*

On the reverse side of which summons was endorsed the following return:

Served the within summons by delivering to the within-named Elias Scofield, president of the board of trustees of the town of Memphis, a true copy of the writ and petition, and by delivering to the within-named John Gharky, Wash. Hudson, Thomas McAllister, and Jos. G. Best, trustees of the town of Memphis, a true copy of the writ.

April 24th, 1874.

C. W. COLE,
Sheriff of Scotland County, Mo.

At the May term, 1874, of the circuit court of Scotland county, in the State of Missouri, held at the court-house in the city of Memphis, in said county—present, Hon. E. V. Wilson, judge, presiding—on the 9th day of May, 1874, the following among other proceedings were had, to wit:

JAMES T. THOMAS
vs.
THE INHABITANTS OF THE TOWN OF MEMPHIS.

At this day comes the defendant and enters his appearance, by Nat. M. Gwynne, its attorney; whereupon leave is granted defendant to make return on writ on or before the first day of the next term of this court, until which time this cause is continued.

And afterwards, at the November term, 1874, of said court,
90 on the 11th day of November, the following among other proceedings were had, to wit:

In the Matter of the State of Missouri at the Relation of JOSEPH T. THOMAS

vs.

JOHN GHARKY, JOSEPH G. BEST, ELIAS SCOFIELD, & WASHINGTON HUDSON, Trustees of the Inhabitants of the Town of Memphis.

At this day comes the plaintiff, by his attorney, and files his amended writ; then comes the defendant by her attorney, Nat. M. Gwynne, and enters his appearance to said writ, and leave is granted said defendant to file his answer herein sixty days before next term, to which time this cause is continued.

And afterwards, at the November term, 1874, of said circuit court, and on the 17th day of November, 1874, the following among other proceedings were had, to wit:

In the Matter of the State of Missouri at the relation of JOSEPH T THOMAS, Plaintiff,

vs.

JOHN GHARKY, JOSEPH G. BEST, ELIAS SCOFIELD, and WASHINGTON HUDSON, Trustees of the Inhabitants of the Town of Memphis, Defendants.

And now, on this 17th day of November, 1874, come as well the said plaintiff and the said relator as the said defendant, and thereupon the return of the said defendant to the writ of alternative mandamus heretofore issued and the pleas and traverse of said relator to said return are submitted to the court for trial; and the court, having heard the evidence, doth find the issues formed in fa-
91 vor of said relator and plaintiff; and the said defendant hath not shown any just cause why a peremptory writ of mandamus should not issue to the said John Gharky, Joseph G. Best, Wash. Hudson & Elias Scofield, as trustees of the inhabitants of the town of Memphis, in the county of Scotland, and State of Missouri, as prayed by said relator, and that the said defendants hath made a false return to said writ—that is to say, it is considered and adjudged that on the said 17th day of November, 1874, the said inhabitants of the town of Memphis was indebted to the plaintiff, Joseph T. Thomas, in the sum of three thousand and ninety dollars and twenty-four cents ($3,090.24), and that said amount will draw six per cent. interest from the 17th day of November, 1874, until paid; and said amount is upon certain matured coupons heretofore issued by the said inhabitants of the town of Memphis in payment of stock subscription made on the 16th day of February, 1871, to the Missouri, Iowa and Nebraska Railroad Company in aid of its construction of railway strength — the corporate limits of said town; that said coupons are for interest falling due upon said bonds so issued in payment as aforesaid of one thousand dollars each, and

numbered one, 3, 6, 7, 9, 11, 13, 14, 17, 21, 22, 23, 24, 25, 26, 28, 29, 30; that eighteen of said coupons matured and fell due on the 1st day of March, 1873, each coupon being for eighty dollars and dated March 1st, 1871, and each coupon draws six per cent. interest per annum from date until paid; that eighteen of said coupons matured and fell due on the 1st day of March, 1874, each coupon being for eighty dollars and dated March 1st, 1874, and each coupon drawing six per cent. interest per annum from the 1st day of March, 1874, until paid; that the amount found due and owing to said Joseph T. Thomas upon the entire number of thirty-six coupons aforesaid at the said November 17th, 1874, is as aforesaid $3,090.24. It is further considered
92 and adjudged that said amount last mentioned is a valid and binding obligation upon the inhabitants of said town of Memphis, and that it was the duty of the said trustees, as the board of trustees of the inhabitants of the town of Memphis, to provide for the payment of the same, to have levied and cause to be collected a special tax, such as might be necessary for that purpose, upon the taxable property, as the same is made taxable by law for such purpose, within the corporate limits of said town; and that said trustees, as such board of trustees, has wholly and wrongfully neglected and refused to make provision for payment as aforesaid.

Whereupon it is by this court considered and adjudged that a writ of peremptory mandamus be issued to said trustees, directing them as such board of trustees to forthwith make ample provision for the payment of said sum of $3,090.24, and the interest thereon as aforesaid, by the levy and collection of taxes as aforesaid upon the property as aforesaid, and that the said Joseph T. Thomas recover of said John Gharky, Joseph G. Best, Elias Scofield, & Wash. Hudson, as such trustees, his costs and charges in this behalf expended, and have execution therefor.

STATE OF MISSOURI, *County of Scotland:*

I, C. F. Sanders, clerk of the circuit court in & for said county, do hereby certify the above and foregoing to be a true and full transcript of the record and proceedings in the above-entitled cause as the same appears of record and on file in my office.

Witness my hand and the seal of said court. Done at office, in Memphis, this 1st day of April, 1886.

[SEAL.] C. F. SANDERS, *Clerk.*

93 Mr. OVERALL: Now we offer in evidence this bond, No. 4, of the bonds and coupons:

Number 4. UNITED STATES OF AMERICA. Dollars 1,000.

Eight Per Cent. Railroad Bond.

TOWN OF MEMPHIS, *County of Scotland.*

Twenty years.

Know all men by these presents that the Town of Memphis, in the

county of Scotland, in the State of Missouri, acknowledges itself indebted to the Missouri, Iowa and Nebraska Railway Company, a corporation existing under and by virtue of the laws of the States of Missouri and Iowa, formed by consolidation of the Alexandria and Nebraska City Railroad Company (formerly Alexandria and Bloomfield Railroad Company), of the State of Missouri, and the Iowa Southern Railway Company, of the State of Iowa, in the sum of one thousand dollars, which sum the said town hereby promises to pay to the said Missouri, Iowa and Nebraska Railway Company or bearer, at the Farmers' Loan & Trust Company, in New York, on the first day of March, A. D. 1891, together with interest thereon from the first day of March, 1871, at the rate of eight per cent. per annum, which interest shall be payable annually, in the city of New York, on the first day of March in each year, as the same shall be due, on the presentation of the coupons hereto annexed—

This bond being issued under and pursuant to an order of
94 the board of trustees of the town of Memphis for subscription to the stock of the Missouri, Iowa and Nebraska Railway Company, as authorized by an act of the General Assembly of the State of Missouri, entitled "An act to incorporate the Alexandria and Bloomfield Railroad Company, approved February 9th, 1857."

In testimony whereof the said town of Memphis has executed this bond by the chairman of the board of trustees of said town, under the order of said board of trustees, signing his name hereto, and the clerk of said board of trustees, under the order thereof, attesting the same and affixing thereto the seal of said board.

This done at the town of Memphis, in the county of Scotland, in the State of Missouri, this first day of March, A. D. 1871.

[Seal Town of Memphis, Scotland Co., Missouri.]

H. H. BYRNE,
Chairman of the Board of Trustees of the Town of Memphis.

Attest: WILLIAM L. KAYS, *Clerk.*

Mr. CUNNINGHAM: Of course we make the objection that we heretofore made, and I suppose your honor will pass upon them at the proper time. They may be taken subject to our exceptions.

The COURT: You will have to get these matters before the court to see the drift of them.

Mr. OVERALL: I understand the articles of consolidation and everything we have tendered are offered formally.

Mr. CUNNINGHAM: Yes; certainly; subject to our objections and exceptions and the ruling of the court.

95 Plaintiff closes.

Mr. CUNNINGHAM: There is but a single matter of evidence that we desire to offer, and that is the act of the Legislature of Missouri of 1859. I have sent for the book, and I will bring it in the morning. It is agreed that I may offer in evidence the act of the General Assembly of the State of Missouri of 1859 repealing the charter

of the town of Memphis, and that the answer may be made to conform to that fact.

The COURT: My mind has been directed from the beginning to the end of this inquiry as to where the power to issue the bonds in these proceedings came from. How, in the light of all this testimony, did you find the power to issue those bonds?

Mr. OVERALL: The power is given in the orders. In the first place, it is given by the charter of the Alexandria & Bloomfield Railroad Company.

The COURT: That question was before Brother McCrary.

Mr. OVERALL: Yes; but I did not insist on that at all. It was determined in the case, however, that the town had the right to make the subscription to the stock, but that they did not have the right to issue bonds then, in 1868. We claim it by virtue of that act, and we insist that there is such authority, and then that there is another authority by the act of the Legislature of 1870, vol. 1, chapter 39, article 2, section 17.

The COURT: That is the statute that Brother McCrary passed on expressly.

Mr. OVERALL: In what case?

The COURT: In this very case.

96 Mr. OVERALL: I don't remember that. I remember Judge McCrary said the act of incorporation of the North Missouri Railroad of 1851, which authorized subscriptions by towns through which that railroad run, gave no authority to issue bonds, but this is the first time I have heard that a general statute did not authorize a town or city to issue bonds under it.

The COURT: That was expressly passed upon in this case, not by Brother McCrary, but by myself.

Mr. OVERALL: That point was not raised in this case. The question you decided at that time was that the section of the North Missouri charter, which I read, did not authorize the issuing of railroad bonds by a town, but it has never been denied that a city could issue bonds under the general railroad law where it was authorized by two-thirds of the qualified voters of the city.

The COURT: Of course authority to issue bonds in connection with a subscription to the stock rests upon the act of 1868, and in compliance with the terms thereof, by voting, etc.

Mr. OVERALL: I understand that, but I did not understand your honor to say that act of 1868, which I have just read, does not authorize a city, town, or county to issue bonds, provided it is authorized by a two-thirds vote. If your honor will remember in reading this, this order for the election was made on the 26th of January, 1871, and the election was held on the 7th of February, 1871, which is 13 days.

The COURT: The law requires how many days?

Mr. OVERALL: That is the point exactly. The law says that the books of registration shall be delivered by the county clerk to the board of registrars 20 days before the election, and that they shall complete the registration 10 days before. We raise two ques-

97 tions: First, that there is a tribunal directed to determine

this question; and that that tribunal has determined it, and that that is conclusive and cannot be inquired into.

Mr. CUNNINGHAM: This is the same case in which your honor made the conclusive ruling before, and if that question goes to the Supreme Court I do not wish to leave a part of our defense out. We have some testimony to offer, and when we have closed the testimony I think we can discuss these questions to better advantage. Your honor has asked the question, "Where is your power?" Now, I do not wish to try this case over again. If they should be right in their theory, we have the testimony here to show that there was no registration. I know that this court must decide in our favor, and I do not want to have it go up without a complete record.

Mr. OVERALL: I am willing to concede that the gentleman can show by the testimony the same as though the witnesses were introduced.

The COURT: *De hors* the record?

Mr. OVERALL: I admit that he will prove that by witnesses.

The COURT: I understand he is not permitted to impeach the record.

Mr. CUNNINGHAM: I think I ought to be permitted to offer my testimony in my own way. I desire to call Mr. Permont to examine him, and if it is ruled out then I can except.

Mr. OVERALL: The witness can be sworn, and then I will object to the testimony.

WILLIAM W. PERMONT was then called by the defendant, and, being duly sworn, testified as follows:

98 By Mr. CUNNINGHAM:

Q. Where do you reside?

A. Scotland county, Missouri.

Q. How long have you resided there?

A. 26 or 27 years.

Q. State whether or not in the years 1870 and 1871 you occupied any public office; and, if so, the nature of it.

A. Well, in 1871, I was appointed registering officer of the township that I lived in.

Q. What township was that?

A. Jefferson.

Q. Did that include the town of Memphis?

A. Yes, sir.

Q. State whether or not prior to the 7th of February, 1871, you made a special registration of the voters of the township wherein the town of Memphis was situated.

Mr. OVERALL: I would like to ask a question before making my objection.

Q. You were registering officer of this township at the time you speak of?

Mr. OVERALL: Well, I will make my objection right now. I object to it on the ground——

The COURT: Let me ask a question:

—. What was your office during those years, sir?
A. I was registering officer at that time—appointed in 1871.
Q. What period of 1871?
A. In March, 1871.
Q. In March, 1870, or 1871?
A. 1871.

The COURT: That was after these matters.
Mr. OVERALL: I don't care about that; I will stand on the proposition of law.
The COURT: Let us go forward. This witness was registering officer from what date?
WITNESS: March, 1871.

Q. This bond was dated 1870?
A. March 1st, 1870.

Mr. CUNNINGHAM: The bond was dated March 1st, 1871.
99 Mr. CUNNINGHAM: The bond has not been read in evidence, and I demand that it be read.
The COURT: It is considered in evidence.
Mr. OVERALL: It is 1871; there is no question about that.
Mr. CUNNINGHAM: It should be read in evidence.
Mr. OVERALL: I supposed it was considered as read in evidence.
The COURT: It was.

—. Well, Mr. Witness, you went into office as registrar what date?
A. Right away, I presume. I was appointed by the county court in 1871, March.
Q. You were not registering officer prior to March 1st?
A. No, sir.
Q. And you can give no information on the subject?
—. ——.

Mr. CUNNINGHAM: I wish to ask another question—whether you know the number of qualified voters there were in the town of Memphis in the month of February, 1871.

Mr. OVERALL: I object.
The COURT: That comes in under all these rulings, from Cass county down. I sustain the objection.

Mr. OVERALL: Now, I wish to ask what I wish explained. You say you were registering officer. There were three officers, were there not, in your county?
A. There was one in each township. This is under the law of 1870—that act of 1870. The Legislature of 1870 passed this, and it went into effect then.
Q. It went into effect on the first of March, 1870?
A. It went into effect that year, I think.
Q. On the first of March, 1870——

Mr. CUNNINGHAM: He testified before he was registering officer in 1870 and not 1871.

Mr. OVERALL: There was an act passed and then another
100 act went into effect in 1870, that you were appointed under?

A. There was a change in the law in 1870, and I was appointed under that.

Q. Were there more than three officers of registration in your county at that time?

A. There were, sir.

Q. When you were appointed or after you were appointed?

A. At the time I was appointed several were appointed—one for each township.

Q. That is, in 1871?

A. Yes, sir.

Q. Prior to that time, in 1870, there were 3?

A. A board of registration.

Q. Composed of three registrars of the county?

A. That is my recollection.

Q. This township that you speak of, was it Carroll township?

A. Yes, sir.

Q. Six miles square?

A. It was the town of——

Q. A township?

A. Yes, sir.

Q. Six miles square?

A. No; it is nine by—I don't know how much.

Q. In some of the townships south of that they are laid out six miles square, and I thought this was the same. This is how much?

A. Nine by six, I believe.

Q. You were registering officer of that whole township?

A. Yes, sir.

Q. You never occupied any office in the city of Memphis; you were not an officer of the city of Memphis?

A. No.

Q. You were a county officer appointed under the State laws?

A. Yes, sir.

Q. And this town of Memphis, how big was it—a mile square?

A. Yes, sir.

Q. It was a mile square?

A. Yes, sir.

101 Q. And this township of which you were registering officer was nine by what?

A. Six, I believe.

Q. How many inhabitants were in the town of Memphis at the November election, 1870?

The COURT: You objected to that question when it was asked by the other side, and I sustained the objection.

Mr. OVERALL: No; I didn't ask how many persons had voted; I wish to show the size of the town.

The COURT: For what purpose?

Mr. OVERALL: I wish to show that it is all a mistake to suppose that there has to be a registration for any city election. No law

ever required it, and I wish to show there was no such thing as a registrar living in the city or having anything to do with the city voting, and there is no law applicable to the city of St. Louis or anywhere else with regard to registration under the act of 1870.

The COURT: How will it enlighten the court by having the witness give the number of inhabitants?

Mr. OVERALL: I was wrong in that, but I wish to show the other fact.

(By Mr. CUNNINGHAM:)

Q. Do you remember the time when the people of the town of Memphis voted on the question of subscription?

A. Yes, sir.

Q. Were you registrar at that time?

A. No; I think not.

Q. You were made so afterwards?

A. Yes, sir; the next month after that.

Mr. OVERALL: Did you vote at that election?

A. I guess so.

Q. You voted for those bonds?

Mr. CUNNINGHAM: I object.

A. I think so.

102 Mr. CUNNINGHAM: Did you live in the town at that time?

A. Yes, sir.

Q. How many voters were there in the town?

The COURT: That is objectionable.

Mr. CUNNINGHAM: He has gone into that thing.

The COURT: No; I stopped him.

Mr. CUNNINGHAM: It is considered that we offer the act of 1859 and '60, showing the repeal of the charter of the town of Memphis, and that we may interline the date in the answer showing that it is a public act, and that the court will take notice of it, I fancy.

The COURT: It is fair to presume that it will.

Mr. OVERALL: We want to object to that, because the town of Memphis when that organization that was existing under the special charter of the Legislature——

The COURT: We will have to look at the statute to see how it reads.

Mr. CUNNINGHAM: You don't object to letting the answer show the date?

Mr. OVERALL: Oh, no.

Mr. CUNNINGHAM: Simply that we have leave to interline the date when we bring the book.

The COURT: The presumption is it is a public act, and the court is presumed to know it.

Mr. OVERALL: Before he put the witness on the stand I agreed to admit the witness would testify so and so. The gentleman would not take the admission. Now, I don't suppose I am to be bound by what the gentleman wouldn't take?

The COURT: Of course not.

Mr. CUNNINGHAM: I think now we are prepared to discuss the question, it being understood the bond is before the court and
103 that the stenographer shall copy it—we are prepared to ask your honor to give rulings upon the points raised. I have written some declarations of law which I wish your honor to pass upon.

The COURT: It all turns on the question of the power of the town to issue bonds.

At this point the court adjourned until to-morrow, April 3, 1886.

APRIL 3, 1886.

The hearing of this case was resumed.

Defendant offered the Laws of Missouri for 1859–'60, page 376—"An act to repeal an act incorporating the town of Memphis, in Scotland county:"

"Be it enacted by the General Assembly of the State of Missouri as follows:

1. That the act entitled 'An act to incorporate the town of Memphis, in Scotland County,' approved November 4, 1857, be, and the same is hereby, repealed.

This act to take effect from and after passage.

December 31, 1859."

This was all the evidence offered.

Whereupon the court of its own motion charged the jury as follows:

Charge to the Jury.

The COURT: The jury are instructed that on the face of the record produced before them they must find for the defendant, inasmuch as by the record no authority is shown on the part of either
104 the town or city of Memphis to issue the bonds in question.

To the giving of which instructions plaintiff then and there at the time excepted.

The case was then submitted and the jury rendered the following verdict:

"*Verdict.*

WILLIAM HILL
vs.
THE CITY OF MEMPHIS. } 2620.

We, the jury, find for the defendant.

F. M. GIFFORD, *Foreman.*"

And on the 7th day of April, 1886 (within four days after verdict), the plaintiff filed his motion for new trial as follows:

Motion for New Trial.

UNITED STATES OF AMERICA;
Eastern District of Missouri:

In the United States Circuit Court for the Eastern District of Missouri.

WILLIAM HILL, Plaintiff, *vs.* CITY OF MEMPHIS, Defendant.

Now comes plaintiff and moves the court to set aside the verdict and judgment entered in this cause for the reasons—

1. The verdict of the jury is against the evidence presented at the trial.
2. The verdict is against the weight of the evidence.
3. The verdict is against the law.
4. The court erred in instructing the jury to find for the defendant.
5. The court erred in instructing the jury that defendant had no power to issue the bonds and interest coupons in contro-
105 versy.
6. The verdict should have been for plaintiff.

F. T. HUGHES AND
JOHN H. OVERALL,
Att'ys for Pl'ff.

Which said motion the court, on the 8th day of April, 1886, overruled; to which ruling and order of the court the plaintiff then and there excepted at the time.

Plaintiff therefore prays the court to allow and sign this bill of exceptions, and that the same may be signed and sealed and made part of the record, which is done this 30th day of April, 1886.

(Signed) SAMUEL TREAT, *Judge.*

Said bond is in words and figures following, to wit:

106 Know all men by these presents that we, William Hill, as principal, and —— —— and —— ——, as sureties, are held and firmly bound unto The City of Memphis, in the county of Scotland and State of Missouri, in the full and just sum of five hundred dollars, to be paid to the said City of Memphis, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 30th day of April, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately at the March term, 1886, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between William Hill, plaintiff, and The City of Memphis, defendant, judgment was rendered against the said William Hill; and the said William Hill having obtained writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said City of Memphis, citing and admonishing it

to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said William Hill shall prosecute said writ to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM HILL,
By J. H. OVERALL, [SEAL.]
His Att'y-in-Fact.
S. E. HOFFMAN. [SEAL.]
W. H. TRASK. [SEAL.]

Sealed and delivered in presence of—
—— ——.

Approved by—
SAMUEL TREAT, *Judge.*

[Endorsed:] No. 2620. United States circuit court, eastern district of Missouri. William Hill *vs.* City of Memphis. Bond, $500.00. —— ——, principal; —— ——, —— ——, sureties. Filed 30th day of April, 1886. A. P. Selby, clerk.

107 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a transcript of the record and proceedings in case No. 2620, of William Hill, plaintiff, against City of Memphis, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this fourth day of August, in the year of our Lord eighteen hundred and eighty-six.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of said Court,
By ——, *Deputy.*

[Endorsed:] No. 2620. United States circuit court, eastern district of Missouri. William Hill against City of Memphis. Duly certified transcript of the record in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 333. William Hill, plaintiff in error, *vs.* The City of Memphis, Missouri. Filed September 6, 1886.

NOV 2 1889

IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1889.

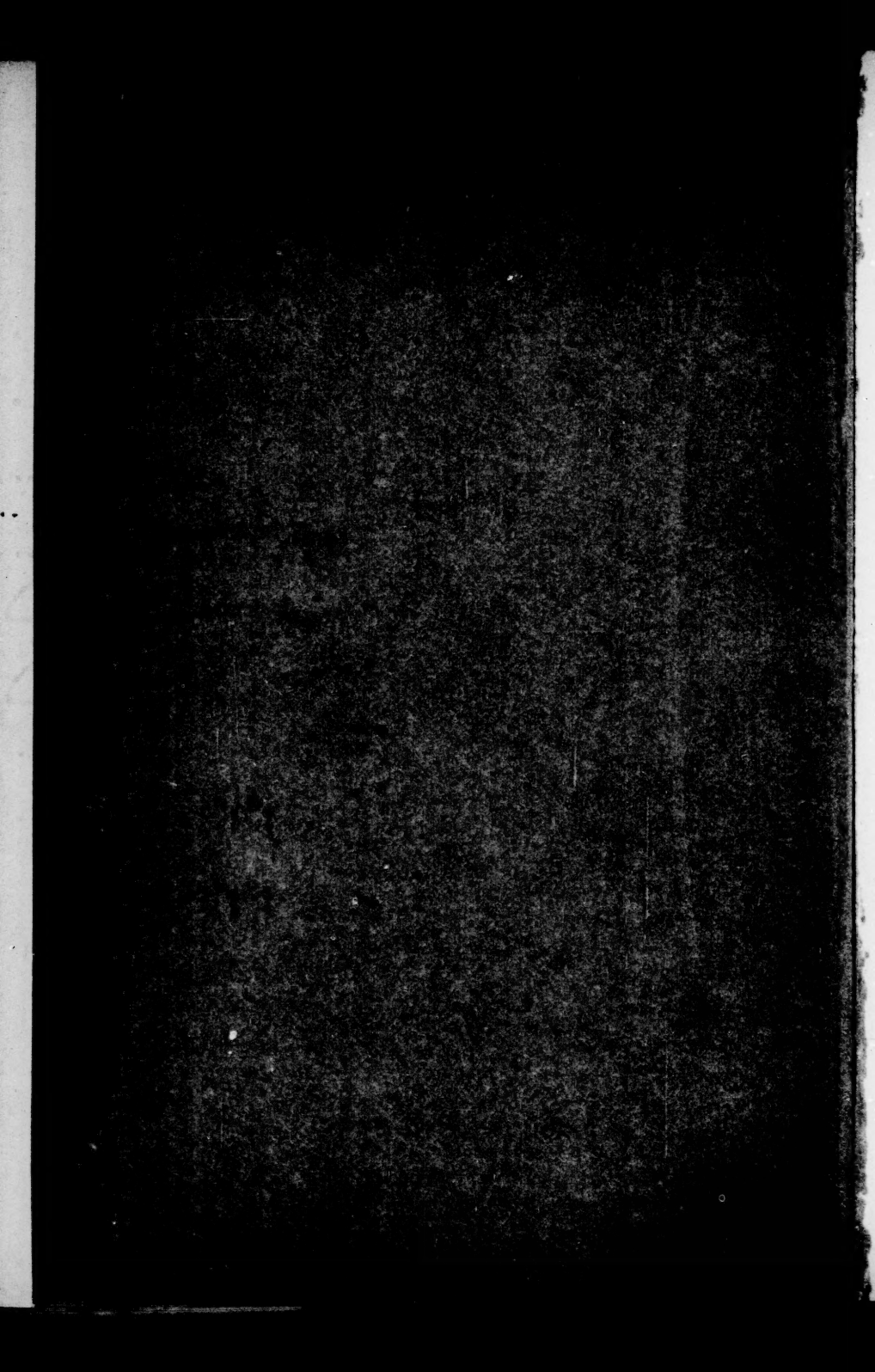
WILLIAM HILL,
Plaintiff in Error,
vs.
CITY OF MEMPHIS,
Defendant in Error.

No. 68

STATEMENT AND BRIEF.

JOHN H. OVERALL
AND F. T. HUGHES,
Attorneys for Plaintiff in Error.

Nixon-Jones Printing Co., 200-212 Pine St., St. Louis.



IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1889.

WILLIAM HILL,
Plaintiff in Error,
vs.
CITY OF MEMPHIS,
Defendant in Error.

No. 68

STATEMENT.

By Section 14 of an act of the Legislature of the State of Missouri approved March 3, 1851, entitled "An act to incorporate the North Missouri Railroad Company" it is provided as follows: —

"§ 14. It shall be lawful for the county court of any county in which any part of the route of said railroad may be to subscribe to the stock of said company, and it may invest its funds in the stock of said company and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interests and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends; and any incorporated city, town or incorporated company may subscribe to the stock of said railroad company, and appoint an agent, to represent its interests, give its vote and receive its dividends; and may take proper steps to guard and protect the interests of said city, town or incorporation." Session Acts 1850, page 483. Record, page 15.

The Alexandria and Bloomfield Railway Company was incorporated by an act of the Legislature of the State of Missouri entitled "An act to incorporate the Alexandria and Bloomfield Railway Company" approved Feb. 9th, 1857, and by the tenth section of said act it is provided as follows:—

"§ 10. Said company shall, in all things, be subject to the same restrictions, and entitled to all the privileges, rights and immunities which were granted to the North Missouri Railroad Company by an act entitled, "An act to incorporate the North Missouri Railroad Company," approved March 3d, 1851, so far as the same are applicable to the company hereby created, as fully and completely as if the same were herein re-enacted." Session Acts 1857, page 94. Record, page 12.

The Town of Memphis was incorporated by a special act of the legislature of the State of Missouri entitled "An act to incorporate the town of Memphis in Scotland County," approved Nov. 4, 1857, and by section two thereof the limits of the town were prescribed as follows:—

"§ 2. The following shall be the corporate limits of said town, to wit: Commencing one-half of a mile due east of the center of the public square of said town, and thence south one-half mile; thence west one mile; thence north one mile; thence east one mile; thence south to the place of beginning." Session Acts 1857, page 434.

The act incorporating the Town of Memphis was repealed by an act of the Legislature of Missouri, entitled "An act to repeal an act incorporating the Town of Memphis, in Scotland county." Session acts 1859, page 376. Thereupon the same area was organized into a municipality under the general laws of Missouri, and known as the inhabitants of the Town of Memphis, and so continued until 1880 when it became incorporated under the General Statutes of Missouri as a city of the fourth class designated as the "City of Memphis," thereby succeeding to the rights and liabilities of the Town of Memphis.

Under authority of an act of the General Assembly of the State of Missouri entitled "An act to amend an act entitled 'An act to incorporate the Alexandria and Bloomfield Railroad Company' approved February 9th, 1857, authorizing said company to change the incorporate name of the company and authorizing said company to extend its road, etc.," approved February 19, 1866, the name of the company was changed to Alexandria and Nebraska City Railway Company. Session Acts 1866, page 222.

On May 11th, 1870, articles of consolidation of the Iowa Southern Railway Company with the Alexandria and Nebraska City Railway Company under the name of Missouri, Iowa & Nebraska Railway Company were filed in the office of Secretary of State of Missouri, and it is not questioned that the consolidated road succeeded to all the rights, immunities and privileges of either road.

There was on January 26th, 1871, a special meeting of the Board of Trustees of the town of Memphis, at which a special election was ordered to be held February 7th, 1871, for the purpose of submitting to the qualified voters a proposition to subscribe for stock of the Missouri, Iowa & Nebraska Railway Company to the amount of $30,000, payable in bonds of said town, to be issued therefor; said board appointing judges of said election and directing that ten days' notice be given by posting hand-bills. It further appears by the record that the board met February 16th, 1871, and made the following formal declaration: "And whereas it appearing to the board of trustees of the town of Memphis that the said notice of the said special election was duly given by said judges of election, in accordance with our order as aforesaid and the law in such cases made and provided; and it further appearing to us that, in accordance with an act to provide for the registration of voters at special elections, Sec. 18, approved March 21st, 1868, the clerk of the county court did cause to be delivered to the officer of registration the books of registration and a special registration was made in said

town of Memphis by said officers of registration in accordance with the provisions of the constitution and of said act, and the said special election was duly held on the 7th day of February, 1871, at which election the said proposition as above described was duly submitted to the voters as aforesaid of the town of Memphis; and at said election there were one hundred and thirty-five votes cast in favor of the said town of Memphis subscribing stock as aforesaid to said railway company and only one against said proposition; and it further appearing that at said election, more than two-thirds of the qualified votes of the said town of Memphis were cast and were in favor of said subscription, etc." Whereupon the board ordered the subscription of stock to be made and the bonds to be issued, appointing an agent to make the subscription in behalf of the town, also a trustee to receive and hold the bonds until the railroad should reach a certain state of completion. In March, 1871, the stock was formally subscribed and the bonds issued — said stock was delivered to the town authorities and the bonds were subsequently delivered to the Railroad Company. The conditions of the subscription were in every respect complied with by the railroad company.

The bonds were recognized by the town and for several years succeeding their issue, taxes were levied and collected and applied to the payment of accruing interest. They bought in a number of the bonds and sold the stock received in payment of subscription, and a suit in the Circuit Court of Scotland County, Mo., by mandamus determined the legality of the subscription and enforced levy of taxes and payment of accruing interest on said bonds. The present action is by a *bona fide* holder.

The judge below held these bonds to be void for want of authority to issue same.

The opinion declared that the power to subscribe for the stock did not carry the right to issue bonds in payment therefor, that the act of March 24th, 1868, intending to authorize towns to issue bonds in payment of prior sub-

scriptions was unconstitutional inasmuch as it assumed to authorize such issuance of bonds "irrespective of the needed vote;" that as a condition precedent to the issue of said bonds there was required the assent of two-thirds of the qualified voters at an election to be held in accordance with the conditions imposed by the registration act of 1868, and that the record showed affirmatively that the special election was void for non-conformity to the provisions of said act, in this, that from the record it appeared that there could not have been a special registration because the clerk of the county court did not have twenty days' time after the election was ordered within which to deliver the registration books to the officers.

BRIEF.

In support of the validity of the bonds, the following propositions are submitted: —

I.

The power conferred upon the town of Memphis by the railroad charter of 1851, to subscribe for its stock, necessarily implied, as incidental to the execution of said power, authority to issue municipal bonds in order to provide for payment of the subscription.

The charter of the North Mo. R. R. so far as concerns the special privileges and powers therein embodied continued unimpaired by any subsequent legislation or the inhibitions of the constitution of 1865. Consequently, the town of Memphis had the same unqualified right, "irrespective of a vote," to make this subscription in 1871, that it enjoyed at any prior date.

That the conditions and requirement announced by subsequent laws declaring a popular vote upon the subject to be a condition precedent to a subscription by municipalities for railroad stock were not retroactive, and that the privileges in this behalf of previous charters continued in full force and vigor until expressly repealed, is too conclusively settled by the repeated decisions of the Supreme Court of Missouri and this court to require argument. In fact, the unconditional right of the town to make this *subscription* is virtually conceded by the opinion of the court in this case.

It being conceded that the absolute power to make this subscription in 1871 prevailed, regardless of the conditions

of registration and election, it therefore follows as a logical sequence that if such power carried with it the authority to issue bonds, then the present issue is unaffected by any of the defects and objections now urged against them.

It may possibly be argued that the legislature obviously intended to distinguish between counties and towns as to this power of issuing bonds since it expressly authorizes counties to not only *subscribe* for stock, but also to *issue* bonds and merely impowered towns to *subscribe* for the stock.

No reason occurs for such distinction unless perhaps it be that counties being only *quasi* corporations, express authority to issue bonds was necessary, while towns and cities being "municipal corporations proper" this power was, therefore, considered incidental to the express grant.

Judge Dillon recognizes this difference between the characteristics and powers of counties and cities and in his work on Munic. Corps., sec. 507, says: "In respect of *public* or *quasi* corporations, such as counties, as distinguished from *municipal* corporations proper, cities and towns, the general current of authority is against the proposition that they have any implied authority to issue commercial securities. But in view of the more complex powers usually conferred upon chartered cities and towns there is a stong tendency in the courts of this country to hold that they, as municipal corporations proper, have an incidental or implied power to issue commercial securities."

In the case at bar the railroad charter authorized the subscribing cities and towns to appoint an agent for the purpose of consummating the subscription, receiving the stock, collecting the dividends, and exercising a general care for the interest of such cities and towns. This would seem of itself to bring the case within the rule announced by the U. S. Supreme Court in Seybert *v.* City of Pittsburg, 1 Wall., p. 272, where the legislative act incorporating a railroad company authorized cities and towns to subscribe for stock "as fully as any individual." The court held

that no further authority to issue the bonds in payment of subscription was necessary, and decided the bonds thus issued to be valid.

Further, upon examination of the numerous similar charters granted by our State from 1849 to 1855, we find no systematic or uniform discrimination in this respect. In many of them the same power is conferred alike upon counties and cities and towns, to subscribe for stock and issue bonds, and in several there is an express limitation upon *cities* and *towns* to the effect that the stock thus subscribed shall not be paid for by their bonds, thus implying that power to subscribe, of itself, gave such cities and towns authority to issue bonds. In illustration of the character of such provisions in various charters, *vide* Laws 1859, p. 418.

The subject as to whether authority to create a debt confers upon a municipal corporation (city or town) the right to issue negotiable bonds when the legislative will is silent, has received much consideration of late years. A leading Pennsylvania case, 84 Pa. St., p. 487, declares that "when a municipal corporation has lawfully contracted a debt it has the implied power unless restricted by its charter or prohibited by statute to evidence the same by bill, bond or note" having all the characteristics of commercial security. This rule appears to be in accord with the weight of current State decisions. There has been no decision of the federal courts establishing a general authoritative rule, each case presenting the question seems to have been determined by the peculiar facts and circumstances accompanying it.

The following are the prominent cases in that regard.

1 Wall. 272, Seybert *v.* City of Pittsburg: —

The Sup. Court of Pennsylvania decided that the power to subscribe for railroad stock carried with it authority to issue bonds therefor, stating tersely "if the corporation legally owes a debt it can give a bond for it." The U. S. Sup. Court adopted this decision and affirmed it.

3 Wall. 654, Rogers *v.* Burlington: —

The city charter authorized the city to "borrow money for public purposes," whereupon the city issued its bonds and loaned same to railroad. Held that the power to borrow money implied authority to issue bonds in aid of the railroad.

15 Wall. 566, Police Jury *v.* Britton: —

Here there was no reason or necessity for attempting to fund the parish indebtedness by the issue of bonds or otherwise and no authority either express or implied for so doing. Therefore, such bonds were held void, but the court in the course of its opinion says, "The power to issue bonds has been frequently implied from other express powers granted. Thus it has been held the power to subscribe for stock in a railroad and other like powers which cannot be carried into execution without borrowing money or giving obligations payable in the future have been held sufficient to raise the implied power to issue such obligations.

But these implications should not in our judgment be extended beyond the fair impression to be gathered from the circumstances of each case."

16 Wall (p. 6), Lynch *v.* County: —

The Iowa statutes declared each county a body corporate and authorized the County Court to provide for erection of public buildings, enjoining that where such improvements involved the borrowing or expenditure of money, there should first be submitted to the people the proposition of borrowing money and of levying an annual tax. The County Court submitted the proposition of levying an additional tax of seven mills on the dollar to be levied annually for ten years for the purpose of raising money to build a Court House. This proposition was carried. *No proposition was submitted to borrow money or issue bonds.*

The County thereupon issued and delivered to the contractor bonds to amount of $20,000.

Held, That although there was not submitted any proposition to borrow money or issue bonds, such authority was implied from the vote and was as effectual as if expressed.

"It could not have been intended that the action should be delayed until a sum sufficient to pay for the structure had been realized from the tax or that the work should proceed only *pari passu* with the progress of its collection from year to year."

102 U. S. 625, Wells *v.* Supervisors: —

The legislative act incorporating the railroad authorized certain counties upon the assent of the voters to subscribe for stock, and further authorized the assessment of a special tax for the payment of such subscription. The act further directed when and in what installments the calls for amount subscribed should be made.

The required election was held, the subscription made and bonds therefor issued and delivered to the railroad.

Held, that from the terms of the act there was manifestly no intention on the part of the legislature to impose on the county to issue bonds to fund this liability, that on the contrary it was expressly provided the payment of subscription should be by taxation, and that the subscription was not required to be paid until the money to be raised by taxation had been collected.

The railroad company knew when it received the subscription that the prescribed tax was the source of payment, and impliedly consented to the delays incident to such collection. Hence the bonds were void.

This case does not disturb the doctrine laid down in Lynch *v.* County, *supra*, on the contrary, the court in respect to these provisions for taxation distinguishes this case from that, and says, had the Legislature merely authorized the subscription and not qualified such authority by express conditions then the county would, as in case of Lynde, *supra*, have had an implied power to issue the bonds on payment of such subscription.

19 Wall 468, Mayor *v.* Ray: —

The charter of the city of Nashville gave it the usual power to levy taxes for govermental purposes, but did not give it power to borrow money. The city being pecuniarily

embarrassed issued its checks drawn on the treasurer in negotiable form. These checks were used for legitimate purposes in meeting the liabilities of the city.

Held that municipal corporations have not the power, without legislative authority expressly or clearly implied, to borrow money or issue commercial securities, that the power of taxation is given them for the puppose of raising the means necessary to carry on their functions and that the creation of such special power is exclusive of others. "The power to issue bands or borrow money does not belong to municipal corporations as an incident of their creation. To be possessed it must be conferred by the legislation either express or implied."

But, says the court, "there are undoubtedly cases in which it is proper that a power of this kind be conferred, as when some extensive public work is to be performed, the expense of which is beyond the immediate resources of reasonable taxation. Such cases belong to the legislative discretion and are to be governed and regulated thereby."

The consideration of the court in this case was evidently addressed to the fact that the city instead of relying upon taxation as the proper source of revenue was habitually issuing these bills to defray current and ordinary expenses.

111 U. S., p. 400, Claiborne Co. *v.* Brooks: The statutes of Tennessee declared counties to be corporations, authorized the erection of public buildings and gave power to levy a special tax for that purpose.

This county contracted for the erection of a court house and issued its negotiable bonds to the contractor in payment. *Held*, that the erection of court houses and jails was among the ordinary administrative duties of counties, and that they had no incidental power without express legislative authority to issue commercial paper in payment of such county debts and charges. That mere political bodies, such as are counties and townships, with the power to levy taxes to defray the public charges created have no power to issue commercial paper in liquidation, unless conferred

by the Legislature or clearly *implied* as necessary to an exercise of some power expressly given. Such power is foreign to the purposes of their creation and is not be conceded except by express legislation or strong implication from such legislation.

This case reviews the decisions and says the local policy of the State concerned, as shown by its laws and decisions, will be regarded as authoritative upon the Federal courts.

5th Dillon, p. 165, Gause *v.* City of Clarksville: —

The Legislature by special act of 1853 incorporated the City of Clarksville and authorized the council to erect wharves and improve the streets, and gave general power to levy taxes not to exceed one-fourth of one per cent.

An amendatory act of 1857 empowered the city to assess and collect a tax not to exceed two per cent. for the purpose of aiding in construction of certain macadamized roads and authorized subscriptions of stock by the city to "any company organized to construct said roads," and directed that any dividends received by the city from such subscription should he paid over *pro rata* to the real estate owners paying the aforesaid tax.

The city thereupon issued three sets of bonds, "Wharf improvement," "Street improvement," and "Road improvement" bonds.

The court held upon a question of authority to issue said bonds, that the erection of a wharf and improvement of streets were within the line of the ordinary municipal duties, and that there was no inherent or incidental power of the city to raise loans for such purposes by sale of its negotiable securities. Consequently said bonds were void.

But in respect of the "road improvement bonds," the court declared that the power conferred by special act to subscribe for stock *of itself authorized the city to issue bonds* in payment therefor.

The opinion recites that this doctrine is in accord with the spirit of Missouri legislation concerning municipal aid to railways and that it is the universal practice under such

legislation to issue bonds for debts of this kind, and avers that the issue of bonds by the city under such circumstances is fully warranted by the decisions of the U. S. Supreme Court.

The principle established by the decisions of the Supreme Court of the United States in this behalf, is substantially to this effect. That while the power to issue commercial paper is not among the ordinary incidental powers of a municipal corporation, yet it may be conferred expressly or by fair implication as a reasonable and usual means of executing the particular power to which it is claimed to be incidental. Such inference will not be extended to liabilities incurred in the discharge of *ordinary* municipal functions. It is contemplated that such expenses shall be met by the revenues derived year by year from taxation, but when the power specially granted involves the creation of debt of such a nature as to be beyond the range of usual municipal expenditure, then, as necessary to execute this power, there is an implied authority to anticipate the revenue to be derived from taxation, and issue bonds or borrow the money.

Especially is this true when the city is authorized to aid a public enterprise distinct from the city proper.

In making application of the foregoing principle there can be no doubt that the case at bar falls within the rule.

By the terms of railroad charter of 1851 authorizing the subscription, the entire amount whenever subscribed became at once due and payable to the company or was to become due at such times and upon such terms as should be agreed upon between the town and this railroad company. Said act made no provision for the payment thereof by taxation, nor did the general statute then in force make any such provision. It was thus impossible for a city or town to have paid its subscription, except by issuing bonds and it must therefore be conceded that the Legislature of 1851 intended that subscribing municipal corporations should have this power.

There was no general railroad law until February 24th,

1853, and the enactment of that date authorized counties and towns alike to subscribe for stock, allowing the proposition to be submitted to the respective voters whether such subscription should be paid by taxation or the issue of bonds. Thus showing that in the mind of the Legislature at that date, when the power to make subscriptions was conferred, no express grant was necessary as authority to issue the bonds.

The power and privilege of making and receiving this subscription as embodied in the charter of 1851 descended unfettered and unrestricted by subsequent legislation to the city of Memphis in 1871, and if the power to subscribe to this railroad in 1851 implied authority to issue bonds in payment then the subscriber of 1871 was entitled to the same privilege. Whatever is implied in law is as effectual as though expressed, and if this railroad charter impliedly gave to subscribing municipalities the power to issue bonds, such power is in no wise limited or impaired by the enactments of later years.

The original charter of the North Mo. R. R. preserved its vitality and characteristics intact until repealed by the special act of 1872.

II.

If any express authority was requisite in order to authorize the issuance of these bonds it was furnished by the Act of March 24th, 1868, entitled "An act to enable counties, cities and towns to *fund* their respective indebtedness."

The act above referred to is as follows: —

"SECTION 1. That the various counties of this State be and they are hereby authorized to fund any and all debts they may owe, and for that purpose may issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached; and

all counties, cities and towns in this State which have or shall hereafter subscribe for the capital stock of any railroad company, may, in payment of such subscription, issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached. The bonds authorized by this act shall be payable not more than twenty years from date thereof." See Session Acts 1859, p. 46.

This act cured any possible defect or omission in the railroad charter of 1851 as to the right of cities and towns to issue bonds, and the City of Memphis became thereby armed with full power to execute and consummate the terms of its subscription by issuing bonds in payment.

The clause of the act affecting the case is that which enables cities and towns to issue their bonds in payment of such railroad stock as they "have or shall *hereafter* subscribe for."

The court below held that this provision was unconstitutional for the reason that it assumed to authorize the *future* issue of bonds for subscriptions regardless of the assent of two-thirds of the qualified voters.

The purpose and scope of the enactment was in express terms to empower municipalities which had already or might thereafter *lawfully* subscribe for railroad stock to issue bonds in payment thereof.

It granted no *new* power of subscription. It did not mean to direct or permit an indiscriminate subscription in the future without the assent of voters when *required*, but was simply in recognition of the continuing, subsisting power and right of certain municipalities, to subscribe at will to the capital stock of those railways whose special charters required no election, and it aimed to give such subscribers express power to issue their bonds in payment. It cannot be disputed that the subscription made by this defendant in 1871 required no election, and the only effect in this case of the act of 1868 was to confer express authority

to issue bonds in payment for a subscription thus lawfully made.

But, says the court, while it is true this subscription was, by the terms of the charter, valid without any election, yet the authority attempted to be conferred by this act to issue bonds was in violation of the constitution because such issue was "a loan of the credit of the city to the railroad" without the necessary assent of voters.

We submit that the issuance of bonds in payment of a previously authorized subscription was not a "loan of credit," consequently the constitutional provision in this respect requiring an election as condition precedent has no application.

The term "loan of credit" necessarily implies the *creation* of a debt or liability, and not the payment or funding of a debt already incurred and it is difficult to understand by what tortuous course of reasoning the conclusion can be reached that such an issue of bonds was a "loan of credit" to the railroad. Had the town assumed gratuitously to issue its bonds for the aid and benefit of the road the position would be different, but here the town received as equivalent for its subscription, stock to the amount of $30,000, and afterwards, by authority of this Act, delivered its bonds in payment. If there was any loan of credit it was the *subscription* whereby the city agreed and obligated itself to pay the railroad $30,000 for the stock. The date of said subscription was Feb. 16, '71. This subscription advanced aid to the road, pledged the credit and resources of the town and rendered it liable to suit and judgment in case of default.

In order to protect the citizens from the onerous taxation which would otherwise have been necessary, this act permits the city to anticipate its revenue by the issue of bonds in payment of the debt incurred by the subscription. The effect of the act was not to authorize the creation of any additional liability, but simply to enable the city to protect

the credit already loaned to the railroad by the subscription.

This of course was designed to apply as well to *all* future subscriptions when the *charters required no elections*, and continued until such special charters were expressly repealed by act of January 30th, 1872.

The Supreme Court of the United States in a recent decision, while considering the legal effect of a similar provision in another act of the Missouri legislature, substantially relieves the act of 1868 of any constitutional infirmity.

102 U. S., p. 634, Ogden *v.* Daviess County:—

The charter of the Platte City & Des Moines Railroad, incorporated in 1860, authorized the counties whenever the inhabitants of any "strip of country" through which the road might pass, should signify their desire to take stock therein and vote a tax upon themselves, to order an election therein, and, if a *majority* of the taxable inhabitants should determine in favor of the tax, made it the duty of the County Court to levy and collect said special tax for the benefit of the road.

On March 24th, *1870*, an act was passed declaring that in all cases when by the provisions of any railroad charter the inhabitants of a "portion of a municipal township" "have voted or may *hereafter* vote to take stock in such railroad company," they should have the same rights conferred upon counties and townships, and the county court should exercise the same power in issuing bonds and collecting taxes.

The county court upon petition to that effect in June, 1870, ordered an election in a section of the county "within a strip of five miles on each side of the railway line." The majority assented to the subscription, and thereupon the county issued its own bonds for the amount.

Held, that such bonds were void for want of authority. The railroad charter merely authorized the levy of a special tax upon the inhabitants of "the strip of country" and furnished no authority for the county to issue its bonds.

Neither did the subsequent act of 1870 supply this authority, as said act was limited by its terms to "a *portion* of a *municipal township*," whereas the "strip of country" voting in this case embraced fractional parts of several different townships.

This supplementary act of 1870 (*supra*) recognizes the power conferred by certain charters to make subscriptions for stock with the assent of a *majority* as unimpaired by the Constitution of 1865, and in order to supply to the county the power to issue its bonds for such subscriptions, says that in all cases when the previous charter of a railway has empowered "a portion of a municipal township" to subscribe for stock in such cases both as to those "who have voted or may *hereafter* vote," the county may issue its bonds in payment of said subscriptions.

This enactment is in *pari materia* with the act of 1868, and is obnoxious to every objection urged by the Circuit Court against the act of 1868, and its constitutionality was questioned. It virtually declares that the power embodied in a railway charter authorizing a subscription upon the vote of a bare *majority* prevails against the conditions imposed by a subsequent constitution and in such cases authorizes the issue of bonds, both as to past and *future* subscriptions.

The Supreme Court, p. 639, pronounce the act valid because "*it granted no new power of subscription*, but simply provided that when *under the charter* of any railroad company (that is to say in accordance with the terms and specifications of said charter), the taxable inhabitants of a portion of a municipal township had voted, or *might vote* to take stock in the company the County Court might issue bonds for the stock so taken." Thus declaring in effect that if the terms of the charter had required *no vote* to authorize a subscription the subsequent act enabling the issue of bonds would be valid, despite the provisions of an intervening constitution.

Had the question before the court been the validity of a

county bond issued in behalf of a *portion of a distinct township* based upon a *majority* vote required by this charter, the court undoubtedly would have sustained the bond as authorized by the act of 1870, notwithstanding the date of such subscription was subsequent to the constitution of 1865.

They decided the bonds in question void simply because the curative or supplementary act of 1870 only applied in its provisions to a portion of a *particular* township and not to a "strip of country" aggregating sections of *several* townships. Had the act conformed to the phraseology of the charter and authorized the issue of bonds in payment of the subscription made or to be made by the inhabitants of such "strip of country" their validity was conceded by this opinion.

The funding act of 1868 was also invoked in aid of the bonds issued. The court did not question its validity for all purposes therein expressed, but said it had no application as this was not a debt or subscription of either a "County, City or Town," and not being a debt of the county, therefore the county was not authorized to issue bonds to fund same.

If the issuance of bonds in the case at bar was not a "*loan of credit*," then no election was enjoined by the constitution or required by the general statute. That it was not a "loan of credit" within the meaning of the constitutional inhibition appears to be judicially settled by the U. S. Supreme Court in case of Ritchie *v.* Franklin County, 22 Wall., p. 67.

In that case Franklin and various other counties, under a misinterpretation of the word "may" as used in the general statutes of 1855, had without authority of a vote of the people, contracted for, and caused to be constructed roads and bridges, and upon a construction of the statute by the Supreme Court of this State, 42 Mo. 171, that "may" meant *shall* and that such a vote was a condition precedent, found themselves unable to complete such improvements

or issue valid bonds for the work done — thereupon the Legislature by an act of March 21st, 1868, interposed and authorized the County Courts (without any election) to issue the bonds for the purpose of paying for such improvements which had been constructed and contracted for, which was accordingly done and the bonds issued and delivered to the various building companies and associations which had performed or agreed to perform the work.

The constitutionality of the act was assailed, but the Court held that it was curative and say "there is no provision in the constitution of Missouri (1865) restraining the general assembly from conferring on counties the authority to borrow money to improve their roads without asking the consent of the voters. If so, why cannot the legislature confer on counties the power to borrow money to pay for "*debts already contracted* for the purpose?" The liability contracted here was no more a debt than the liability contracted by the town of Memphis in making its subscription.

Why did the Court thus sanction the act of the legislature? The answer is conclusive. Because the act did not authorize the *creation* of an indebtedness, but simply empowered the counties to issue these bonds in *payment* of certain debts *already contracted*, and was not therefore a "loan of credit" within the meaning of the constitution, consequently no vote was necessary to sanction the issue of the bonds. The Supreme Court of Mo., 48 Mo. 175, also upheld the act and its conclusions are adopted in the case just cited.

The phrase "loan of credit" as appearing in the constitution and the statute enacted thereunder is a loose expression, vague and undefinable. We cite the leading cases where the term has received judicial consideration and construction. In the case of State *v.* Curators, 48 Mo., when Phelps county undertook without any vote to issue and donate its bonds to the State University in order to secure the location of a mining school in that county, the

Supreme Court enjoined the issue, held that it was a "loan of credit" and could not be authorized by the legislature except by a two-thirds vote of the county. Judge Napton says, "What was the object of this constitutional restriction on county courts, city or town municipalities? The object was plainly to prevent them from *taxing* the people without their consent." In the case at bar it was not the issue of bonds but the *subscription* that composed the burden of taxation.

And in the Forest Park case, 58 Mo. 198, in distinguishing the latter case from the former the court reiterates the doctrine of the former and says such an issue of bonds was evidently a "loan of credit," because gratuitous and "*the county got no property in exchange for its bonds.*"

5 Dillon, Jarrott *v.* City of Moberly:—

The legislative act of 1870 assumed to authorize the city by the sanction of a *majority* vote to issue its bonds for the purchase of certain real estate to be donated to the railroad as an inducement to build its machine shops in that locality.

Held, This was a "loan of credit," the act therefore unconstitutional and the bonds consequently void. The opinion designates the loaning of credit as a "*creation* of debt for the benefit of the corporation," and says that the plain purpose of the constitution was to prevent the incurring of debts in aid of railways to be paid by taxation, unless two-thirds of the qualified voters should formally assent.

This case was affirmed by Supreme Court, 103 U. S., p. 585. In the course of his opinion, Justice Field says that this inhibition in State constitution was to prevent the creation of debts in behalf of corporations without the assent of two-thirds of the qualified voters, "to check these abuses *before any more stock should be subscribed*, and any further indebtedness thus incurred."

The purpose of the constitution in this respect was salutary and it may be said with equal propriety that the pur-

poses of the act of 1868 was likewise. Since it authorized the creation of no new or additional debt, but on the contrary sought to relieve the taxpayers of the burden incurred by subscription to capital stock by extending the period of payment until the maturity of the bonds to be issued during which interval the necessary amount could be collected by annual taxation without oppression.

16 Wall. p. 159, James *v.* Milwaukee: —

The Legislature authorized the city "to lend its credit" to certain railways. In pursuance of this authority the city issued and delivered gratuitously to said roads its bonds and they were held valid. We cite this case as showing the correct interpretation of the term "loan of credit."

92 U. S. 625, The Town of Concord *v.* Bank: —

This case recites a marked distinction between subscription and loan of credit as used in the constitution, and says that "for subscription to capital stock the municipality gets something for which there was at least a possibility of return," while a "loan of credit is aid *ex gratia*.

A loan of credit is either a donation or guaranty while a subscription necessarily implies a sale of the capital stock at specified price and a purchase upon agreed terms.

The constitution forbids the Legislature to authorize any county or town "to become a stockholder in or loan its credit to" a corporation unless two-thirds of the qualified voters shall assent thereto.

The statutory enactment designed to enforce this provision of the Constitution makes it lawful for the legal representatives of any county or town "to take stock in or loan the credit thereof to any railroad company provided two-thirds of the qualified voters shall assent to such *subscription*." And upon the making of such subscription authorize said county or town, as the case may be, in order to raise the funds to pay the installments in their discretion, either to *issue bonds* or levy and collect a special tax. Wagner's Stat. 1870, Sections 17, 18 and 21, pages 305–6.

It will be observed that by the terms of the statute it is

not required to submit for the approval of voters any proposition as to *issuing bonds*, but only the question of *subscription* and when that has received the assent of voters then the county or town may *ex suo motu* issue the bonds.

Sec. 21 provides that all counties or towns which have *heretofore* subscribed are authorized to issue bonds in payment and may levy a special tax to pay the interest and principal when due.

This law failed to meet the requirements and exigencies of the case at bar as well as numerous similar cases.

The original charter of 1851 had secured to the town of Memphis the power and privilege to make subscription for its capital stock *without any vote*, but such power to subscribe, it was claimed, did not carry with it authority to issue bonds in payment. This law furnished no relief in such respect. Under its provisions there was no opportunity to submit to the voters a separate proposition to issue bonds and by such assent gain the necessary authority. It only contemplated the submission of a single question, *subscription*, which submission in the case at bar was entirely unnecessary.

It might be argued that this law (in force in 1871) by implication justified the issue of bonds wherever a duly authorized subscription should be made, whether by the assent of voters or in accordance with the terms of the railway charter, but be that as it may, in order to relieve all doubt and meet the wants of this class of cases the Legislature, by the act of 1868, interposes and says that all counties, cities and towns "which shall *hereafter* subscribe for the capital stock of any railroad" may in payment of such subscription issue their bonds.

It will be observed that this act *grants no original power to subscribe*. It assumes that such power has already been granted but not exercised, and simply empowers the subscribers, when such dormant power shall have been exercised, to issue the bonds.

Sec. 21, Wagner's Statutes (*supra*), *which was in force* in

1871, having been carried down from the Rev. Stat. of 1855, authorized all counties and towns which have "*heretofore* subscribed for capital stock" to issue bonds in payment. Apply the same reasoning to this section that the Circuit Court applied to act of 1868 and it would be in conflict with the constitution of 1865 for two reasons: it attempts to validify subscriptions made since said constitution, regardless of the necessary assent of voters, and authorizes the issue of bonds therefor without any election; said issue being in legal effect a loan of credit to the railroad.

Such construction is not supported by the context and does evident violence to the intention of the Legislature. The purpose was in cases where subscriptions had theretofore been made *by authority of law* as conferred by the railroad charter or the statute in force at date of subscription, to *supply* the express power when needed, of issuing bonds in payment. This construction of the section avoids any conflict with the constitution, and the fact that this section was the law *prior* to the constitution of 1865 and was without alteration re-enacted *subsequent* to said constitution is in confirmance of our position that the issue of bonds in payment of capital stock subscribed was not considered such "a loan of credit" as is designated and forbidden by the constitution.

In 55 Mo. 499, the Supreme Court, upon being asked for an opinion as to whether an extension of time to the H. & St. Joe R. R. allowing as ubstitution of new bonds for old ones, would be a "loan of credit," had no hesitation in declaring that "a loan of credit" was when a loan or gift was proposed, and not an extension of time to a *previous* loan.

The act of 1868 was perfectly adapted to the case at bar. The subscription by previous authority of the Railway charter was made "thereafter" and the bonds issued in payment were in pursuance of the authority of this act.

Wherein is it unconstitutional? It neither authorizes a subscription nor directs "a loan of credit." This stat-

ute being arraigned for unconstitutionality is, as declared by the courts, entitled to the benefit of even a "reasonable doubt." It is unnecessary to quote the stereotyped rules of interpretation or recall the becoming hesitation always manifested by the Federal judiciary to set at naught a statutory enactment as being in violation of the State constitution, especially so where said statute has prevailed for years without question from the bench or bar of the State, notwithstanding repeated opportunities of so doing and thereby received at least tacid approbation.

When the Legislature of 1851 awarded this charter authorizing cities and towns to subscribe for stock, it undoubtedly had authority if necessary to confer upon said cities and towns express power to issue bonds in payment. Its failure to do so was, if express power was necessary, an *omission* for which it undertook in later years, 1868, to supply a cure.

True, during the interval, a new constitution had been adopted restricting future legislation in this behalf — but it is conceded to be the general rule that is within the domain of the Legislature by curative act to complete and effectuate its original intent, consequently this act of 1868 authorizing the issue of bonds relates back to the date of the charter, 1851, and is just as effectual as if it had been therein originally expressed.

Put the case thus: Suppose the town of Memphis had in pursuance of the railway charter subscribed to the stock at any date *prior* to the constitution of 1865, but had delayed issuing bonds by reason of a question as to its *implied* power to do so. Could not the Legislature *subsequently* by an appropriate act have settled the doubt? — cured the defect and granted the express power to issue bonds, notwithstanding the intervention of a new constitution imposing prospective conditions?

The fact that such subscription, which was by virtue of a previous power, was not made until subsequent to the constitution, in no wise affects or modifies the principle invoked.

III.

The laws of Missouri did not require that there should be a special registration before the election at which the qualified voters of the Town of Memphis authorized these bonds to be issued.

The Town Board, on Jan. 26th, 1871, directed a formal submission to the voters, at a special election to be held Feb 7th, of the proposition of subscription to the capital stock of the railway company to be paid for by town bonds, and not less than ten days' notice of the election to be given. The election was held and 135 qualified voters cast their ballots in favor of the proposition and one against it.

The record shows a meeting of the Board Feb. 16th, 1871, and recites that such election was duly held in accordance with the order of the Board, and that there was a special registration of voters in accordance with the provisions of section 18, of the registration act of 1868. The proposition was pronounced carried, and the subscription and issue of bonds ordered.

The court held this election invalid, for the reason that the record showed on its face a non-compliance with the registration law controlling "special elections" in this, that it showed that sufficient time had not elapsed between the election and the order therefor to comply with section 18 of the registration law. That section is as follows: —

"Sec. 18. For the purpose of keeping the list of qualified voters complete the clerk of the county court shall, *twenty days before any special election* (except elections for school purposes) *cause to be delivered to the board of registration, or any member thereof, the books of registration, returned by said board of registration*, who shall immediately proceed to register the names of such persons as have became qualified voters after the closing of the registry, and all such persons as may be entitled to

registration, but who, for any good and sufficient cause, failed to present themselves for registration at the last general registration. Said board shall, *whenever an election is to be held in any election district within their county* before the next general election, certify to the judges of election the additional names registered by said board, along with the general list made out at the preceding general registry. *Said board shall complete said books of registration five days prior to said special election.* In making such registration, said board shall be governed by the provisions of the constitution and of this act as far as applicable to general registration. *Except that said board shall hold a session of but one day in any election district;* and provided, that no board of review shall be held for any special election."

We submit;

First: —

The Constitution did not contemplate, nor did the registration act of 1868 require, that there should be a special registration for the purposes of such elections.

The provisions of the suffrage article of the Constitution of 1865 were directed to the qualification of officers, state, county and municipal, and the qualifications of parties assuming to vote for such officers; Sec. 8 of Art. 2, providing that no certificate of election should be awarded unless the applicant had first subscribed the required oath of loyalty; and Sec. 18 of Art. 2, declaring that every citizen who is qualified as a voter in accordance with the requirements of the Constitution shall be allowed "registration as a voter" and "shall be entitled to vote at such election for all officers, state, county and municipal, made elective by the people."

Section 4, Article 2, Constitution of 1865, provides that "The General Assembly shall immediately provide, by law, for a complete and uniform registration *by election districts* of the names of qualified voters in this State; which registration shall be evidence of the qualifications of all registered voters to vote at any election thereafter," etc.

The only cases where by the terms of the constitution a *special* election is ordered are when a vacancy occurs in the office of Senator, Representative, Sheriff, Coronor, or Circuit Judge. These are the "special elections" to which Sec. 18, of the registration law of 1868 was intended to apply.

In obedience to the precept of the constitution the Legislature passed an act providing for a biennial registration of voters preceding each general election, and "for the purpose of keeping the list of qualified voters complete" provided for an additional or supplementary registration "before any special election" as is shown by section 18 hereinbefore set forth in full.

This claim, we insist, is limitive by the reason and spirit as well as the context of the constitution and act itself to such "special elections" as are required and *ordered* by the law of the State to fill vacancies in office occasioned by the death, resignation, or disqualification of the incumbent, and does not include those cases where the *privilege* of a special election is awarded a County, township or town in order to determine a question of local interest.

Such an election is not, strictly speaking, "in pursuance of the laws of this State." There is no mandate directing an election, but simply a *license* of which the municipality may or may not, in its discretion, avail itself, and such an election when held is, properly speaking, in pursuance, or by virtue, of an *ordinance* of the *municipality*.

In the case at bar the constitution orders no election, but merely forbids the legislature to authorize a subscription of stock "unless two-thirds of the qualified voters at a general or special election to be held therein shall assent thereto." The legislature commands no election but simply makes such subscription "lawful," provided said "assent" shall be given.

The town desiring to avail itself of the privilege of subscription thus conferred passes an ordinance directing a special election to be held on Feb. 7th, 1871.

There had been a general election in November previous, also the regular biennial registration of voters.

It is unreasonable to suppose that it was the intention of the act of 1868 to set in motion for the purposes of *such* "special election" the complex and expensive machinery therein provided.

All costs and expenses thus incurred are by the terms of the act to be "paid out of the *county* treasury," which tends to show that local elections occurring withing the townships or districts of a county were not considered within the province of the act.

In the case of Cass Co. *v.* Johnson, 95 U. S. 360, a special election was ordered for the township to occur April 20th, 1869. It is manifest that there was no "additional registration" for the purpose of this election and as the recitals in the bond created no *estoppel* as to such defense it appears to have been tacitly conceded by all parties and the court as well that the provisions of Sec. 18 of act of 1868 did not apply to such special eleetions.

Hon. J. B. Henderson, in an essay designed to uphold the Supreme Court decision in this case, *vide* 5 Cent. Law Journal, pp. 499–502, says we think explicity, that no additional registration was required or authorized and that "registration was required to be made only biennially."

Sec. 18 expressly excepts "elections for school purposes." Such elections are for the *offices* of state superintendent, county superintendent, township board of education and local directors, and in all such cases the elections are *directed* by the statutes.

Said exception was for obvious reasons, and the fact of the exception lends force to the view, that the other "special" elections designated as requiring additional registration were of like character, that is to say, elections to office "in pursuance of the laws of the State."

Second: —

Section 4 of Art. 2, of the Constitution of 1865, required the General Assembly to provide for registration

"by election districts" only, and a careful reading of the registration law of 1868 must show that the General Assembly did not attempt to provide for the registration of *parts* of election districts.

According to the undisputed testimony, the election district was Carroll township, embracing *an area of six by nine miles.*

Memphis, then (1871) an unincorporated town or village, was situated within the limits of said district, constituting part thereof and having *an area of one square mile.*

The machinery of the registration law of 1868 was only contrived and arranged to apply to "each election district" *as a whole.* The "books" were designed and prepared for the "registration of voters *in each election district*" and were required to be delivered by the clerk of the county court to the "board of registration," whose duty it was, in the language of the act, "whenever an election is to be held *in any election district* within the county, before the next general election to certify to the judges of election the additional names registered by said board along with the general list made out at the preceding general registry."

Carroll township was the election district. The town of Memphis had not been set apart as an election district, but was embraced in said township district, of which it was only a part. Consequently there was no provision of the registration law of 1868 adapted to or requiring special registration of the town.

In 3 Dillon, p. 195, Judson *v.* Plattsburg, the case is exactly parallel. There was a special election submitting the proposal to subscribe for $25,000 of stock, but no special registration. The court, in passing upon this alleged defect, says: "The town of Plattsburg had not been set apart or designated as an election district, but was embraced in the township district in which it was situated. Under the constitutional provisions, upon obtaining a two-third vote in favor, the town had an unquestioned right to subscribe. There was to be no special township election,

and hence no need of a special registration for such. There being no provision, under the law of 1868, requiring special registration of towns for municipal elections when such towns were embraced within and a part of a township election district, as was the case with Plattsburg. Use was made of the last township registration."

The election was sustained and the bonds held valid.

IV.

It is not true that the records of the Town Board showed that no special registration was duly had before the election.

Section 18, above quoted, provides "that said board shall hold a session of but one day in any election district," and Section 4, of Article 2 of the constitution of 1865 provides that "no person shall vote unless his name shall have been registered at least ten days before the day of the election." The bonds in controversy were placed upon the market and are held by a *bona fide* holder who had no actual knowledge of the facts concerning their issuance. For years the town levied taxes for the payment of the interest on these bonds. The taxes thus levied were collected and applied to the payment of such interest and in fact some of the bond themselves redeemed before their maturity. The submission to the electors having been ordered on January 26th for an election on February 7th, there was time for one day's registration as provided by Section 18 of the Act of 1868, so that persons could have been registered "ten days before the day of the election" and thus become qualified voters as provided by Section 4 of Article 2, of the constitution of 1865. And as the record of the Town Board showed that a special registration had been made as provided by Section 18 aforesaid, the plaintiff was bound only to know the contents of the record and had a right to presume that they spoke the truth and that a special registration was had for one day, at least ten days before the election.

It is true that Section 18 provides that "the clerk of the County Court shall, twenty days before any special election, cause to be delivered to the board of registration or any member thereof, the books of registration," but this is merely directory and was not intended to invalidate an election when such books were delivered less than twenty days before the election and the registration was in fact had at least ten days before such election.

JOHN H. OVERALL
AND F. T. HUGHES,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 68.

WILLIAM HILL, PLAINTIFF IN ERROR,

v.

THE CITY OF MEMPHIS, MISSOURI.

STATEMENT.

This was a suit upon 138 coupons, for eighty dollars each, instituted in the Circuit Court of the United States for the Eastern District of Missouri.

The form of said coupons and bonds was not pleaded by plaintiff, but his evidence (page 45, printed record) shows that, excepting numbers and dates of maturity, each of said coupons was a lithograph in words and figures as follows:

80. *Railroad Bond Coupon.* 80.

MEMPHIS, Mo., *March* 1, 1871.

The town of Memphis, State of Missouri, will pay to the bearer on March 1, 1885, at the Farmers' Loan & Trust Company, in New York, eighty dollars, being *one year's interest* on Bond No. 4, for $1,000.

H. H. BYRNE, *Chairman.*

These coupons were proven to have been detached from bonds, each of which, excepting numbers, was in words and figures as follows (page 59, printed record):

Number 4. UNITED STATES OF AMERICA. Dollars 1,000.

Eight Per Cent. Railroad Bond.

TOWN OF MEMPHIS, *County of Scotland.*

Twenty years.

Know all men by these presents that the town of Memphis, in the county of Scotland, in the State of Missouri, acknowledges itself indebted to the Missouri, Iowa and Nebraska Railway Company, a corporation existing under and by virtue of the laws of the States of Missouri and Iowa, formed by consolidation of the Alexandria and Nebraska City Railroad Company (formerly Alexandria and Bloomfield Railroad Company) of the State of Missouri, and the Iowa Southern Railway Company, of the State of Iowa, in the sum of one thousand dollars, which sum the said town hereby promises to pay to the said Missouri, Iowa and Nebraska Railway Company, or bearer, at the Farmers' Loan and Trust Company in New York, on the first day of March, A. D. 1891, with interest thereon from the first day of March, 1871, at the rate of *eight* per cent. per annum, which interest shall be payable annually in the City of New York, on the first day of March, in each year, as the same shall become due, on the presentation of the coupons hereto annexed. This bond being issued under and pursuant to an order of the Board of Trustees of *the town of Memphis*, for subscription to the stock of the Missouri, Iowa and Nebraska Railway Company as *authorized* by *an act of the General Assembly* of the *State of Missouri entitled*, '*An act to incorporate the Alexandria and Bloomfield Railroad Company, approved February* 9, 1857.' In testimony whereof the said *town of Memphis* has executed this bond by the chairman of the board of trustees signing his name hereto, and the clerk of said board of trustees under the order thereof attesting the same and affixing thereto the seal of said board. Thus done at the town of Memphis, in the county of Scotland, in the State of Missouri, this first day of March, A. D. 1871.

[Seal Town of Memphis, Scotland Co., Missouri.]

H. H. BYRNE,

Chairman of the Board of Trustees of the Town of Memphis.

Attest: WILLIAM L. KAYS, *Clerk.*

It will be observed that the only power recited in the bond was the averment that the said bond was issued for subscription to the stock of the *Missouri, Iowa and Nebraska Railway Company* as authorized by an act of the General Assembly of the State of Missouri, entitled "An act to incorporate the Alexandria and Bloomfield Railroad Company," approved February 9, 1857.

The charter of the Alexandria and Bloomfield Railroad Company contained a section (page 12 of the printed record, page 7 of this brief) importing the privileges and restrictions of the North Missouri Railroad charter of March 1, 1851. Section 14 of said N. M. R.R. charter (page 15 of printed record, page 7 of this brief), while it

conferred power upon *counties*—1st, to subscribe stock; 2d, to invest its funds in said stock; 3d, *and* to issue bonds of said county to raise funds to pay the stock thus subscribed; 4th, *and to take proper steps* to protect the interests *and credit* of the county; 5th, appointment of an agent to *represent* the county, &c., limited the power of towns: 1st. To subscription of stock; 2d. To appointment of agent to represent its *interests*, give its vote, and receive its demands (probably dividends); 3d, to take proper steps to guard and protect the interests in (of) such town. It will be shown in argument that this, the only power recited in the bond, gave no authority to issue bonds even if plaintiff had proven, as he pleaded, that by the adoption of section 1, An act of the General Assembly of the State of Missouri, amendatory of the Alexandria and Bloomfield charter, set forth at page 17 of printed record and at page 20 of this brief, the Missouri, Iowa and Nebraska Railway Company succeeded to the rights of the Alexandria and Bloomfield charter.

Plaintiff in his petition, however, not only pleaded the aforesaid pretended authority, but also another power not recited in the bond, viz., that conferred upon counties, cities, and *incorporated* towns by the general railroad law of Missouri then in force, the condition precedent to the exercise of which power, it will be shown in argument, was the consent by vote of two-thirds of the qualified voters of such *incorporated* town, not merely to subscription of stock, but also to the lending of credit, *i. e.*, issue of bonds. Said section of the general railroad law, under which plaintiff pleaded but failed to prove authority for subscription of stock *or* issue of bonds, is set forth at page 8 of this brief, together with the constitutional limitation, only in so far as it conformed to which it was valid.

Defendant's answer pleaded— after general denial,

1st. *Non est factum.*

2d. That at no time, at any general or special election therein held, have two-thirds of the qualified voters of the city of Memphis or of the town of Memphis (titles under which legislature might incorporate), or of "the inhabitants of the town of Memphis" (the latter a title under which county courts might, by record order, incorporate towns), assented to any subscription of stock or to any issue of bonds by such corporation.

3d. That by an act of the General Assembly of the State of Missouri, entitled "An act to repeal an act to incorporate the town of Memphis," approved December 31, 1859, said town did, after said date, cease to have corporate existence; that defendant had been, since 1880, a *de facto* city of the fourth class, but that, between the years 1860

and 1880, there had existed in the State of Missouri no lawfully constituted corporate body known as "The Town of Memphis," or known as "The Inhabitants of the Town of Memphis."

These allegations were placed in issue by plaintiff's attorney and the case was tried before the court and a jury. Upon the trial, plaintiff only offered, as proof that the Missouri, Iowa and Nebraska Railway Company was the successor of the Alexandria and Bloomfield Railroad Company, the testimony of Mr. Felix T. Hughes that about the year 1870, or probably in 1872, he first saw, in the office and custody of the secretary of the Missouri, Iowa and Nebraska Railway Company, a book purporting to be a record of the Alexandria & Bloomfield Railroad Company, but which witness could not swear that he ever knew to have been in the custody of the Alexandria & Bloomfield Railroad Company, wherein was an entry adopting the first section of an act amendatory of said A. & B. charter and authorizing it to change its name to that of "*The Alexandria & Nebraska City Railroad.*" The said amendatory act, which it is elsewhere contended was unconstitutional, provided that only such parts thereof as should be adopted by the Alexandria & Bloomfield Railroad Company should become binding in law.

The record shows that plaintiff utterly failed to prove by competent testimony that any *incorporated* town known as the town of Memphis or "The Inhabitants of the Town of Memphis" existed at the date of alleged subscription of stock or issue of bonds.

All of plaintiff's testimony was taken by the court, subject to defendant's objections and exceptions.

Plaintiff's only testimony tending to show the existence of a *de facto* corporation was testimony of Mr. Kays that he had acted as clerk of the board of trustees of the town of Memphis in 1870–1871, and as such signed the bonds. The printed record, at page 30, shows that defendant's counsel insisted in vain upon competent proof of the existence of a corporation known as the town of Memphis or "The inhabitants of the town of Memphis."

Plaintiff offered, subject to defendant's objections, what purported to be a copy of records of the town of Memphis as of date of January 20, 1871, but certified by one Penny, a clerk of the city of Memphis, in 1882, showing an order for a special election to be held February 7, 1871, only *twelve days thereafter*, upon the proposition "Shall the town of Memphis subscribe stock to the amount of $30,000 to the railroad company," and a similar certified copy of what purported to have been an order entered February 16, 1871, reciting that said election had been held in conformity to the registration law, and that a

majority of more than two-thirds of the qualified votes were cast in favor of said subscription of stock *in the M. I. & N. R.R. Co.*

The said order further authorized the issue of $30,000 in eight per cent. bonds of $1,000 each.

Plaintiff's own witness, Kays (pages 40–43, printed record), who swore that he was clerk of the *de facto* board of trustees at the dates of said pretended orders, admitted that said order of February 16, 1871, was never made by said board as entered upon the alleged record; that the minutes of the meeting of said board of trustees, February 16, 1871, were written down by one Birch, as clerk *pro tem.;* that said minutes as thus written down were shown to said Kays by said clerk *pro tem.;* that they contained no finding concerning registration of qualified voters or a majority of two-thirds, &c.; that after discussion, said clerk *pro tem.* interlined in the minutes said statements, falsely showing a lawful registration of qualified voters, and requested Kays to enter same upon the said general record book; that Kays refused to enter same, because untrue, and that thereupon said Birch so entered and signed same as clerk *pro tem.*, so as to make the same read as set forth in said copy of February 16, 1871.

Plaintiff offered defective and incompetent testimony feebly tending to show that said *de facto* board of trustees did, after March 1, 1872, apparently under duress, pay some interest coupons or make some compromise and take the stock, but inasmuch as there was no proper plea of estoppel and an utter failure upon plaintiff's part to show power in the *de facto* board to create the obligations thus alleged to have been recognized, it seems almost unnecessary to add the statement that at and before the dates of each of the said alleged acts of estoppel trustees of incorporated towns were specifically forbidden by law from thus binding the corporations they represented and punishable as felons if they so transgressed.

Said law is set forth in full at page 20 of appendix to this brief.

Defendant offered an act of the General Assembly of the State of Missouri, approved December 31, 1859 (printed record, page 66), showing that the only act lawfully incorporating the town of Memphis, in Scotland county, Mo., had been repealed eleven years before the making of contracts herein involved.

It will be demonstrated in the argument that if all said alleged proceedings of the board of trustees of Memphis had been valid instead of being void, for the reasons already stated, said pretended records, on their face, proved that it was impossible to have held a special election in conformity to the registration law at the time named—twelve days after date of order. Further, that said pretended order of January

20, 1871, on its face directed an election of voters, not of qualified voters, to sanction a subscription of stock to "the Railroad Company," not to the M., I. & N. R.R. Co., as afterwards falsely recited in the testimony alleged to have been made by the clerk *pro tem*. It will be shown that the organic law in force at that time required a ⅔ majority of qualified voters of every incorporated town to assent to a *loan of credit* as well as to a subscription of stock.

The Court charged the jury as follows:

The jury are instructed that on the face of the record produced before them they must find for the defendant, inasmuch as by the record no authority is shown on the part of either the town or the city of Memphis to issue the bonds in question.

Plaintiff excepted generally to said charge, the jury found for defendant, plaintiff filed motion for new trial, which was overruled, and he thereupon sued out the writ of error herein.

Points and Authorities.

I.

The bonds (page 37, printed record) recite that they were "issued under and pursuant to an order of the board of trustees of the town of Memphis, for subscription to the Missouri, Iowa and Nebraska Railway Company, as authorized by an act of the General Assembly of the State of Missouri entitled "An act to incorporate the Alexandria and Bloomfield Railroad Company, approved Feb'y 9, 1857."

Every purchaser was bound to inquire—

1. As to the power of those who executed the bonds.
2. As to the authority of the alleged agents.
3. As to compliance with formalities of a public nature required in execution of bonds.
4. That there was no criminal violation of law or usury in the execution of the bond.

Chambers County *v.* Clews, 21 Wall., 324.
Cromwell *v.* Sac Co., 96 U. S., 51.
Merchants' Bank *v.* Bergen, 115 U. S., 391.

There was no power to issue bonds conferred upon any incorporated town or city by this act of Feb'y 9, 1857, recited in the bonds.

The printed record at page 12 shows:

On the 9th day of February, 1857, (L. M., 1856–7, pp. 95, 96), the General Assembly of the State of Missouri, by an act incorporating the A. & B. R.R. Co., and taking effect on said day, provided by Section 10 thereof:

"Said company shall in all things be subject to the *same restrictions*, and entitled to all the privileges, rights, and immunities which were granted to the North Missouri Railroad Company, by an act entitled 'An act to incorporate the North Missouri Railroad Company, apporved March 3, 1851,' so far as the same are applicable to the company hereby created, as fully and completely as if the same were hereby re-enacted."

The 14th section of said North Missouri R.R. charter thus imported into the A. & B. charter provided (printed record, page 15):

It shall be lawful for the county court of any county, in which any part of the route of said railroad may be, to subscribe to the stock of said company, and it may invest its funds in the stock of said company, and issue the bonds of such county to raise funds to pay the

stock thus subscribed and to take proper measures to protect the interest and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends; and (any) incorporated city, town, or incorporated company may subscribe to the stock to said railroad company, and appoint an agent to represent its interests, give its vote, and receive its demands (dividends), and may take proper steps to guard and protect the interests in (of) such city, town, or corporation.

The fact that this charter specifically gave counties power (1st), to subscribe stock; (2d), to issue bonds to raise funds to pay such subscription; (3d), to take proper steps to protect the *credit* of such county (*i. e.*, to levy special taxes to pay bonds), and the same section merely authorized towns to subscribe stock, and protect the interests of the city, clearly demonstrates a legislative intent to limit towns to subscriptions of stock, payable out of the general funds.

Hill *v.* Memphis, 23 Federal Reporter, 872.

Judge McCreary, in a case between the same parties, reported only in *Missouri Republican* of Oct. 1, 1881, held to the same effect as Judge Treat.

This Court has repeatedly recognized the doctrine that such power to subscribe stock did not imply power to issue bonds.

Norton *v.* Dyersburg, 127 U. S., 160.

Kelley *v.* Milan, 127 U. S., 130.

McClure *v.* Oxford, 94 U. S., 433.

There was an utter failure of proof of the condition precedent of assent of two-thirds of qualified voters of the town of Memphis, whereby subscription was alleged to have been made under section 17 of the General Railroad Law of Missouri (G. S. of Mo., 1865, p. 338).

That section was as follows:

SEC. 17. It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town to take stock for such county, city, or town in *or loan the credit thereof to* any railroad duly *organized under this* or any *other law* of the State, *provided* that two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent to such subscription.

G. S. of Mo., 1865, 338.

Elsewhere in this brief I have presented the point that so much of this section 17 as seems to permit a loan of credit without the ⅔ majority of qualified voters assent to anything more than subscription of stock was repugnant to Section 14, Article 2, of the Constitution of

Missouri of 1865, which declared (G. S. of Mo., 1865, page 43) that "the General Assembly shall not authorize any county or town to become a stockholder in, *or to loan its credit* to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election, to be held therein, shall assent *thereto*;" but assuming, for the purposes of this point, that plaintiff established the existence of an incorporated town by the name of the town of Memphis; that the alteration of the minutes, and the false entry thereof upon the general record, were binding and valid; that a vote to "subscribe stock in the Railroad Company" conferred the right to lend the town credit or issue bonds, I submit that no one could have been misled into believing that the assent of ⅔ majority of qualified voters to any subscription of stock had been lawfully obtained.

The bond does not recite the condition precedent of an election, therefore there is no estoppel because of recitals in record, and the same may be disputed and contradicted.

Independent Public School *v.* Stone, 106 U. S., 183.
Carroll *v.* Smith, 111 U. S., 556.
Marsh *v.* Fulton Co., 10 Wall., 253.
Carpenter *v.* Lathrop, 51 M. R., 483.

In this case it is manifest, upon the face of the two alleged records of the town of Memphis (viz., those of January 26, 1871, and February 16, 1871, offered in evidence by plaintiff), that every one who may have inspected them was warned that the General Registration election law of 1868, then in force, could not have been complied with. (All the relevant sections of said registration law, together with the sections of the organic law providing for their enactment, are printed in full at page 21 of appendix to this argument.)

The record shows that on January 26, 1871, an election was ordered for February 7, 1871, twelve days after the order, and held on that day, not to obtain assent to loan of credit or issue of bonds, but merely to "subscription of stock to the Railroad Company."

Session Laws of Missouri, 1868, 136, Sec. 18, required that clerk, &c., *shall*, twenty days before any special election, cause to be delivered to the board of registration, or any member thereof, the books of registration, who *shall immediately* proceed to register qualified voters, &c. Said section does not authorize registration until within five days of election, as claimed by plaintiff's counsel, but merely requires that the registration books shall be completed five days before the election. Sec. 4 of Art. 2 of the Constitution of 1865 made it impossible for

any one to vote unless registered at least ten days before the election. This section, recognizing said obligation, provides that, in making such special registration, said board shall be governed by the provisions of the Constitution and of said Act, &c., except that said board should hold a session of but one day in any election district, &c. Sec. 2 of the registration law requires that notice shall be given in each district ten days before day of first session. These ten days' notice, added to the one day session required by Section 18, make eleven days, and the additional provision that the books shall be completed at least five days prior to election necessitates at least sixteen, instead of twelve, days' time, regarding the matter from the standpoint advocated by plaintiff; but Sec. 7, page 153, shows that the law actually required the registration to be completed on or before the eighteenth day next preceding any election. So that it is evident the entire twenty days named in Sec. 18 were absolutely necessary to a valid election.

Section 18, of said registration law, provided that, in making the registration for any special election, the board of registration should be governed by the provisions of the onestitution and of the registration law concerning general elections and registration therefor, so as to make applicable all the provisions hereinbefore cited.

No election, whether general or special, is valid, unless preceded by registration.

State *v.* Albin, 44 M. R., 349, affirmed 46 M. R., 454.

State *v.* Brassfield, 67 M. R., 331.

Ensworth vs Albin 46 Nor 453

Where the officers of registration have, prior to an election, for any reason, refused or declined to perform their duty, the election subsequently held is void.

Zeiber *v.* Chapman, 54 M. R., 505.

Omission to hold election at *proper time* makes same void.

State *v.* Jenkins, 43 M. R., 261.

On the 12th of December, 1870, took effect the constitutional amendment, permitting all who had been disfranchised on account of participation in or sympathy with the rebellion, all males above the age of 21 who had one year prior thereto declared their intention to become citizens, and all males, white or black, of the age of 21, who had resided in the election precinct sixty day before any election, to register as voters. So that it may be assumed that failure to make special registration as required by law was not merely a technical omission, but a practical disfranchisement of an overwhelming majority of voters

who would have registered had the opportunity as directed by the registration law been offered to them.

Recitals, whether in bonds or in records, do not extend to matters of law, of which all persons are bound to take notice.

Dinan County *v.* Field, 111 U. S., 83.

County *v.* Winters, 97 U. S., 83.

Town of South Ottawa *v.* Perkins, 94 U. S., 267.

McClure vs Oxford 94 US 433

III.

If plaintiff in error had proven a lawful election, if subscription of stock with assent of qualified voters authorized issue of bonds, or if, upon the other hand, he had established power under the special charter or subsequent laws to issue bonds without assent of qualified voters, the fact remains that he could not have recovered because there was no proof of the existence of a lawfully incorporated town of Memphis in January to March, 1871, the indispensable foundation of any power to subscribe railway stock under the laws of Missouri.

There is reason in holding that where one is found in the possession of an office in a lawfully organized community, those recognizing his official capacity should be protected; but the doctrine of *de facto* officers cannot be enlarged into recognition of the right of *de facto* officers to create a *de facto* town which may be bound under power granted only to an incorporated town. We admit that the City of Memphis by its appearance and pleadings conceded that it was a *de facto* corporation, but whether as a *de jure* or *de facto* corporation it was not bound to confess the incorporation of its predecessor. Every purchaser was bound to know that under public laws of Missouri there were three kinds of towns or cities:

1. Unincorporated towns or cities, for whom, in the absence of incorporation, the county court was a trustee (Laws of Missouri, 1865, page 247–8, Secs. 1 and 8).

2. Cities or towns incorporated by the State Legislature like the town of Memphis, laws of Missouri, 1857, page 434 (repealed L. M., 1859–60, page 376), whereby a *mayor* and *city council* were authorized for its government. He was bound to know that the bonds on their face did not purport to be signed by a mayor or authorized by a city council. Under the issues made by answer (page 7, printed record), he was bound to inquire as to authority of the *chairman of board of trustees* and the *clerk* who signed and sealed the bonds in the name of a defunct corporation (Huff *v.* Jasper County, 110 U. S., 53; The Floyd Acceptances, 7 Wall., 666.

3. If it was not incorporated by a public act of the General Assembly of the State of Missouri, he was bound to know that it could only be styled "The Inhabitants of the Town of Memphis" (a name not used in the bonds), and must, in that case, have been incorporated upon proper petition by an order of record in the county court as provided by general statutes of Missouri, 1865, page 240, (printed in full at page 22, Appendix to this argument).

Every purchaser was bound to know that if there was an incorporated town in the State of Missouri by the name and style used in the bonds and the seal thereto affixed, viz., the town of Memphis, Scotland county, Missouri, it could only have existed March 1, 1871, under legislative authority. Turning to the statutes of the State he would have found that there was such a town created in 1857, but that the act creating it was repealed by the following act (Laws of Missouri, 1859–60, page 376):

AN ACT to repeal an act incorporating the Town of Memphis, in Scotland County.

Be it enacted by the General Assembly of the State of Missouri, as follows:

§ 1. That the act entitled "An act to incorporate the Town of Memphis, in Scotland County," approved November 4, 1857, be, and the same is, hereby repealed. This act to take effect from its passage.

Approved December 31, 1859.

In Kayser *v.* Bremen, 16 M. R., as in Laird *v.* De Soto, there was an incorporation by the county court upon *petition of a majority of the inhabitants.*

The facts stated in the opinion of Mr. Justice Miller, in case of Laird *v.* City of De Soto, Missouri (22 Federal Reporter, 422), show that there is no conflict between said decision and the point here made. Laird proved by competent record evidence that there had been created by the county court under G. S. of Mo., 1865, p. 240, an incorporated town by the name and style of "The Inhabitants of the Town of De Soto;" that in 1872, under *that name and style*, they issued bonds; that in 1877, under the new general law authorizing such changes, said "Inhabitants of the Town of De Soto" organized as a city of the fourth class.

The record in this case discloses the utter failure to establish the existence of *any* incorporated town, either by the name in which the bonds were made and sealed or any other—a name and seal which, under the laws of Missouri at that time, could only be lawfully authorized by a public act of that General Assembly which abolished said

town eleven years before the bonds were signed and sealed in the name of the defunct corporation.

The organization of the City of Memphis in 1880, under the then recently enacted general law authorizing same, does not demonstrate that there existed nine years before that time an incorporated town by the name and style of "The Town of Memphis."

See said Law, page 23 of this brief.

That law specifically permitted unincorporated towns to become cities. Municipal bonds made without authority previously conferred may, in the language of Mr. Justice Harlan (112 U. S., 261), be legalized by subsequent legislation, "when such legislation is not prohibited by the Constitution, and when that which was done would have been legal had it been done under legislative sanction previously given." Here it should be noted that every copy of alleged records of the town of Memphis offered by plaintiff in error upon the trial was certified in or after the year 1880 by the clerk of the city of Memphis, with the statement that said city of Memphis was "formed from the former town of Memphis and that he is the custodian of the records of said town of Memphis." Such a certificate surely does not to the slightest extent prove that "the former town of Memphis" was either in 1871 or in 1880, when merged in the city, an incorporated town. The decisions cited show that where a town was not created by act of the Legislature declaring it a public act, as was the case with the original charter of Memphis (laws of Mo., 1857, 434; repealed laws of Mo., 1859–'60, 376), municipal incorporation must be pleaded and affirmatively established in every instance wherein is involved such corporate power as is herein claimed.

In 1879, when upon such certification it was contended that the board of trustees of the town of Memphis (page 52, printed record) authorized its chairman "to receipt for the stock in the M. I. & N. R.R., belonging to the town of Memphis, the amply sufficient restrictions hereinbefore cited in this brief had been supplemented by absolute prohibitions of any ratification contained in the constitution of Missouri, adopted in 1875 (Sec. 47, Art. iv, R. S. of Mo., vol. 1, page lxv; Sec. 19, Art. xii, *Ibid*, page lxxxvi; Sec. 6, Art. ix, *Ibid*, page lxxvi; Sec. 1 of schedule, *Ibid*, page lxxxix), whereby all power even in the Legislature to validate unauthorized obligations by any curative or retrospective act was specifically denied. Every charter or law which had previously sanctioned municipal subscription or loan of credit to any corporation was repealed, and any exercise of such acts by any municipality thereafter forbidden.

The propositions herein presented are sustained in City of Hopkins *v.* K. C. S. J. & C. B. R.R. Co. (79 M. R., 109), Hambleton *v.* Town of Dexter (89 M. R., 191), Norton *v.* Shelby County (118 U. S., 443), Town of South Ottawa *v.* Perkins (94 U. S., 267), Daviess Co. *v.* Dickinson (117 U. S., 665), State *v.* Miller (66 M. R., 328), St. Louis *v.* Bell Telephone Co. (96 M. R., 628), 1 Dillon Mun. Corp., 3d ed., sec. 89; Leach *v.* Craig (60 M. R., 316).

IV.

If this had been a suit for money had and received instead of an action upon bonds clearly issued *ultra vires*, plaintiff would still have been helpless without proof that the Missouri, Iowa and Nebraska Railway Company succeeded to the privileges of the Alexandria and Bloomfield Railroad Company.

The recital in bonds, which the board of trustees had no power to issue, that they were issued under an order of said board for subscription to stock in the Missouri, Iowa and Nebraska Railway Company as authorized by act incorporating the Alexandria and Bloomfield Railroad Company, accomplishes nothing, because, even if there was an incorporated town, there was no power in it, under the charter recited, to make bonds, and the bond itself being unlawful cannot be used to prove any recital it contains.

Moreover, the recitals contained in said bond are otherwise insufficient.

The bond contains no reference to the amendatory act of February 19, 1866, printed in appendix at page 20, upon the adoption of which by the Alexandria and Bloomfield Railroad Company depended its right to a change of name, not to the "Alexandria and Nebraska City Railroad Company," as named in the bond, but to that of the "Alexandria and Nebraska City Railroad," a different name. That law by its terms could only become operative when and to the extent it might be adopted by the Alexandria and Bloomfield Railroad Company.

Mr. Hughes' proof that he saw in the custody of the *Missouri, Iowa and Nebraska Railway Company*, in or after 1870, a book purporting to be a record of the Alexandria and Bloomfield Railroad Company, which contained a minute of such adoption, was not competent or sufficient evidence that said act ever became a law as required by its terms.

If acceptance of said law had been proven, or if it be held that, by reasoning in a circle, persons without authority could create an estoppel tantamount to authority by inserting false recitals in a bond they had not power to make, it still remains to us to contend that, upon the face of said amendatory act of February 19, 1866 (printed in full at page 20, of this argument), it was unconstitutional and void, because repugnant to the twenty-fifth section of Article IV of the constitution of Missouri of 1865.

"No act shall be revived or re-enacted by mere reference to the title thereof; nor shall any act be amended by providing that designated words thereof shall be struck out and others inserted in lieu thereof; but in every such case the act revived or re-enacted, or the act or part of act amended, shall be set forth and published at length as if it were an original act or provision."

General Statutes of Mo., 1865, page 31, construed in French *v.* Wood, 58 M. R., 66.

The Supreme Court of Missouri, in French *v.* Woodward (58 M. R., 68), has not only held this provision of the constitution to be *mandatory*, but declared a law invalid and *void* for a far less flagrant discrepancy than is made manifest in this case.

Foster *v.* Callaway Co., 93 U. S., 571.

Mok *v.* Detroit Bdg. Co., 30 Mich., 527.

The act did not purport to add new sections to an existing law. It did not purport to remedy defects in the existing law. It did purport to be amendatory, with a most peculiar delegation of authority to the directors to determine how much of the old law should be amended.

It will not do to contend that it was not, as stated in the title, an amendatory act, because the XXXIId section of Article IV of the constitution of Missouri of 1865 provides that—

No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed.

V.

In the face of all the objections hereinbefore stated, plaintiff seems to assume that, although there was not only no proof of the existence of an incorporated town, but, on the contrary, positive proof that the bonds were signed and sealed in the name of a corporation lawfully abolished eleven years before the date of said contracts, although there was no competent evidence that said pretended town ever subscribed stock in the Missouri, Iowa and Nebraska Railway Company, or that said company succeeded to the privileges of the Alexandria & Bloomfield Railroad Company by the latter company's adoption of the amendatory act of 1866; that said act was constitutional; that it was unnecessary to prove that the route of said Alexandria & Bloomfield R.R. Co. was in or through an incorporated town of Memphis; that because there was power, under the Alexandria & Bloomfield charter, for incorporated towns through which the route of said road might lie to subscribe *stock* without any assent of qualified voters, therefore the following act of the General Assembly of the State of Missouri (Laws of Mo., 1868, p. 46), coupled with the limited power of subscription contained in the act incorporating the Alexandria & Bloomfield Railroad Company, approved February 9, 1857, authorized the alleged board of trustees of the town of Memphis to issue to the Missouri, Iowa and Nebraska Railway Company the bonds herein involved.

Said act reads as follows:

COUNTIES, CITIES, AND TOWNS: FUNDING OF DEBT.

AN ACT to enable Counties, Cities, and incorporated Towns to fund their respective debts.

SECTION 1. Counties may fund their debts; may issue bonds for that purpose not bearing more than ten per cent. interest; bonds to be payable not more than twenty years from date; act, when to take effect.

Be it enacted by the general assembly of the State of Missouri, as follows:

SECTION 1. That the various counties of this State be, and they are hereby, authorized to fund any and all debts they may owe, and for

that purpose may issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached; and all counties, cities, or towns in this State which have or shall hereafter subscribe for the capital stock of any railroad company may, in payment of such subscriptions, issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached. The bonds authorized by this act shall be payable not more than twenty years from date thereof.

This act to take effect from and after its passage.

Approved March 24, 1868.

It seems manifest that this act was tampered with during its passage. Starting as an innocent bill permitting the funding of debts then existing, as indicated by the title and syllabus, it was altered so as to permit counties, cities, or towns which have or *shall hereafter* subscribe for the capital stock of any railroad company to issue bonds in payment of such subscription, &c.

All the matter thus added authorizing counties, cities, or towns thereafter subscribing to capital stock of railway company was invalid and void for two reasons:

Firstly. So much of said act as authorized issue of bonds in payment of stock thereafter subscribed to railway companies was repugnant to the fourteenth section, Article eleven, of the Constitution of the State of Missouri.

G. S. of Mo., 1865, page 43:

The General Assembly shall not authorize any county, city, or town to become a stockholder in or to loan its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town at a regular or special election to be held therefor shall assent thereto.

There was manifestly no power to towns to *issue bonds* under the charter of the A. & B. R.R. Co. In every case wherein this Court has considered said constitutional limitation, it has been offered as evidence of repeal of previously enacted special charter, powers, or privileges which *did* confer power to *issue* bonds as well as to subscribe stock.

The effect herein sought for the act of 1868 is the converse of the doctrine upon which all the special charter bonds of Missouri were sustained by this Court.

Therein this Court has settled conclusively the doctrine that special charter powers to subscribe stock and issue bonds were not repealed by subsequent general organic or statute laws. In this case it would seem that plaintiff must either maintain that a subsequent statute law

repealed the organic limitation of 1865, or that a previous charter power could be enlarged by a general statute in defiance of the constitution.

Webb *v.* Lafayette County (67 M. R., page 370) clearly shows that this act was only regarded as applicable in authorizing ten per cent. interest in a case where there was already *specific charter power in a county to issue bonds bearing six per cent.*

Said charter power is printed in full at page 23, of Appendix.

Laws of Mo., 1859–60, 395, 400.

Taylor *v.* Louisiana (105 U. S., 455), is manifestly inapplicable.

There was, in that case, a special act, *authorizing the city to issue bonds, if sanctioned by a majority* of qualified voters. The record shows that *special* law was enacted *before* the taking effect of the constitution of Missouri, July 4, 1865, and was, like the law governing the Macon bond case and all the special charters interpreted by this court or the Supreme Court of the United States, not subject to repeal by *subsequent* general organic or statute laws.

Commrs. *v.* January (94 U. S., 205) is not an authority against the city of Memphis, because, although the bond in said case of Commrs. *v.* January recited the wrong law, the proof showed a valid law, which gave full power for the acts performed by the Commissioners in conformity to its provisions. In that case, while the Commissioners had power, they took stock and created an estoppel. In this case the only testimony that stock was ever received by the town of Memphis is the certificate of clerk of city of Memphis that records of town of Memphis in *his* custody show order to take stock from Metz in 1879, eight years after contract, involved herein, and at a time where it is elsewhere shown there was absolutely no power to estop the town (especially see act of January 30, 1872, page 20 of appendix to this argument.)

Construing the aforesaid provision of the constitution of 1865, the Supreme Court of Missouri in case of State *v.* Curators of State University (57 M. R., 181) said: "The manifest intention of the constitution was to prevent any *taxation* without the assent of the taxpayers. No *loan* of *credit* was allowed to any company, association, or corporation without the consent of those who had to pay it; whether educational, benevolent, or otherwise, public or private, the object is not considered." Harrell v. Doherty 103 U.S. 580

The 17th section of the general railroad law of 1865, cited in argument at page 8 of this brief, has in every reported case with which I am familiar been invoked in vain, like the constitutional limitation, with a view to showing repeal of special charter

powers granted before 1865. For this reason, probably, no court before that which tried this case has had its attention directed to the fact that said section 17 of the general railroad law of 1865, in so far as it authorized loan of credit in cases where only subscription of stock might be voted, was itself repugnant to the organic law, because clearly said Section XIV, Article 11, printed at page 9 of this brief, using the disjunctive "*or*" before the words "loan of credit," required assent of ⅔ of qualified voters to such loan of credit, as well as to subscription of stock. I therefore contended in the lower court, as I do here, that if plaintiff had not failed in proving consent of qualified voters to the proposition to subscribe stock, and if all the various other objections had been removed, the bonds could not even then have been lawfully issued by an incorporated town under the general railroad law, because there was no attempt in the order for an election to obtain assent of qualified voters to a loan of credit, as contradistinguished from a subscription of stock, and no finding in the record order of February 16, 1871, that the voters sanctioned anything more than a subscription of stock.

Secondly. If any court should now for the first time declare that the *restrictions* of a special charter of 1851, imported in the charter of 1857 named in the bond as the sole authority for its execution, can be virtually repealed and the privileges of that charter power substantially increased by this act of 1868, in defiance of the prior organic law of 1865, it would still be pertinent to ask whether said act of 1868 was not repugnant to the XXXIId sec. of Art. IV, of the Constitution of Missouri of 1865, which required the subject-matter of law to be set forth in the title. Subscriptions to railroad stock and issue of bonds therefor have always been described as extraordinary debts. The title of this funding act contains no intimation that subsequent subscriptions of stock to railroad companies and subsequent issues of bonds, or loans of credit, were contemplated.

The XXXIId sec. of Art. IV of the Constitution of Missouri (G. S. of Mo., 1865, p. 31) read, as follows:

> No law enacted by the General Assembly shall relate to more than one subject and that shall be expressed in the title, but if any subject embraced in an act be not expressed in the title such act shall be void only as to so much thereof as is not so expressed.

Subscriptions of stock and bonds thereafter to be made were different subjects from the existing debts contemplated by the title. This provision was mandatory.

State *v.* Lafayette Co., 41 M. R., 39.

State *v.* Persenger, 67 M. R., 346.

VI.

As to alleged estoppel by payment of taxes, it is sufficient to answer that it is settled law that corporate ratification cannot validate an act which was *ultra vires*. In this case we have demonstrated that the condition precedent of a valid election was wanting, and that the special charter was impotent, as to issue of bonds by any incorporated town, and that there was no assent of qualified (*i. e.*, registered) voters at any lawful election, even to subscription of stock. It is not pretended by plaintiff that there was ever any assent of qualified voters to issue of bonds. The law (Exhibit A, Appendix, page 20) shows that the trustees of incorporated towns were forbidden, under penalty of incarceration in the penitentiary, from creating directly any such contracts as it is claimed were after said date ratifiedby said trustees.

Under the practise act of Missouri, if plaintiff desired to recover upon estoppel he should have separately pleaded such cause of action, and fully shown that at dates of such alleged ratification the corporation had power to create the obligation. That principle is fundamental and requires no citation of authority.

As to the mandamus proceedings (page 53 of printed record), by the summons wherein, alleged trustees of the inhabitants of the town of Memphis were required (page 57, printed record) "to answer a petition of the State of Missouri at the relation of *the town of Memphis*," but in which judgment seems finally to have been rendered in favor of one Thomas, as relator, it seems sufficient to say that any legal effect it might have is destroyed by the fact, patent upon the face of the transcript, that it is not (as asserted by plaintiff, page 53, printed record) a complete transcript; it is not, as asserted by plaintiff, "a suit upon this very bond," or any other bond, but is, as was denied, a mandamus proceeding to enforce payment of coupons not involved in this suit. The pretended transcript omits, as is shown by the judgment therein (page 58, printed record), the return of defendants to alternative writ and plea and traverse of relator. I have recently received, and have now in my possession, a complete certified copy of said record, missing return, &c., including a certified copy of the agreed statement of facts upon which said case was submitted, wherein nearly every important point made by the city of Memphis herein was, for the purposes of that trial, specifically admitted away. If opposing counsel desire it, and the Court permits it, I will furnish them with my complete certified copy of aforesaid record in said case, and consent, by stipulation, to print same as a part of the record herein at any time before case is called. At best, it

is manifest that suit was between different parties (page 57 printed record); that the sheriff did not return service of any writ except that "*at relation* of the town of Memphis," which he seems to have served upon trustees of said relator and not on trustees of the inhabitants of the town of Memphis. The voluntary appearance of Gynne is not for the trustees, but for the inhabitants of the town of Memphis. The unfounded judgment (printed record, page 58), which is against trustees of the inhabitants of the town of Memphis, was for $3,000.24, 2d and 3d maturing coupons, due in 1873 and 1874. Nothing in this suit matured before 5th coupons of March, 1876 (page 5, printed record).

If, as is not proven, the Circuit Court had jurisdiction to render such a judgment, it certainly bound only those made parties, and said parties only. As to the subject-matter of the suit, it only indicates that a town may have been incorporated by county court (see law D, page 22 of this brief) under the name of "The Inhabitants of the Town of Memphis," three years after the bonds were made in the name of the defunct corporation styled "The Town of Memphis." Such a record is without authority as an adjudication under the rulings of this Court. If the record had been complete, it could constitute no estoppel concerning entirely different coupons herein involved.

Cromwell *v.* Sac County, 94 U. S., ~~360~~ 353
Ashpelen *v.* Nixon, 4 How., 467.
Lewis *v.* Shreveport, 108 U. S., 282.
Russell *v.* Place, 94 U. S., 606.
Daviess Co. *v.* Dickinson, 117 U. S., 665.
Norton *v.* Shelby County, 118 U. S., 443.
Barkley *v.* Levee Commrs, 93 U. S., 258.
Anthony *v.* Jasper County, 101 U. S., 603.
Mearsh *v.* Fulton County, 10 Wall., 676.
Ruggles *v.* Collier, 43 M. R., 353.
Ottowa *v.* Carey, 108 U. S., 110.
Boyd *v.* Alabama, 94 U. S., 648.

State vs St Lt Lt
1 Mo A 543
Tapping on Mandamus
5, 322, 323
State vs Holliday
65 Mo 76
State of Md vs Everett 52 Mo 89

VII.

Section 20 of General Railroad Law of Missouri (G. S. of Mo., 1865, 338) reads as follows:

Any county or city subscribing as aforesaid may (if so required by the railroad company to raise funds to pay the installments in anticipation of the collection and payment of its railroad tax) issue bonds of such city or county, of denominations not exceeding one thousand

dollars, and bearing interest at a rate not exceeding *seven* per cent. per annum.

Interpreting said section 20, known as section 33 of the Revised Statutes of Missouri, 1855, vol. 1, p. 427, the Supreme Court of Missouri, in Beattie *v.* Andrew County (56 M. R., 42), declared that under the *general railroad law* no bond bearing more than *seven* per cent. was authorized, although under charters specifically authorizing the issue of bonds like that again interpreted in 67 M. R., 370, (see page 23 of this brief), it was held that as the general law permitted individuals to pay ten per cent. corporations might under such charter power do likewise. It seems scarcely necessary for the court in 67 M. R. to have construed the three acts together in order to find authority for a rate of interest which had previously been adjudged to be implied in a charter power like section 2, of the L. & St. L. R.R., page 23 of this brief), but certainly nothing said can be distorted into a modification of the constitutional prohibition (page 15 of this brief).

In Smith *v.* Clark County (54 M. R., 62) the bonds *actually recited that they were issued under the general railroad law of* 1855 (54 M. R., p. 62), and bore 7 per cent. interest, and that court held under the law, as settled in January, 1865, the recital estopped the county, as against an innocent holder, but that after 1870 the contrary was the settled law of Missouri. Moreover, that agreed case, page 65, shows that it was admitted, that the bonds were issued under the *special charter* power in 1864, *before the taking* effect of the constitution and revised statutes of 1865. That power gave ample authority to *counties* to issue bonds without a vote of the people, but no such power to towns.

Plaintiff in error has not yet filed his brief and I am forced to surmise his points. While it is believed that he must fail unless he makes good his general exception to the charge of the Court, each point herein seems sufficient in behalf of defendant in error.

HENRY A. CUNNINGHAM,
Attorney for Defendant in Error.

Appendix.

APPENDIX.

A.

AN ACT to protect Counties, Cities, and incorporated Towns from combinations between Railroad Companies, County Courts, City Councils, and Boards of Trustees of incorporated towns.

SEC. 1. No county court of any county, city council of any city, nor any board of trustees of any incorporated town, shall hereafter have the right to donate, take, or subscribe stock for such county, city, or incorporated town, or loan the credit thereof to any railroad company, or other company, corporation, or association, unless authorized so to do by a vote of two-thirds of the qualified voters of such county, city, or incorporated town, and any justice of a county court, member of a city council, or member of board of trustees of any incorporated town who shall hereafter vote to donate, take, or subscribe stock for such county, city, or incorporated town, or loan the credit thereof to any railroad company, or other company or association, unless authorized to do so by a vote of two-thirds of the qualified voters of such county, city, or incorporated town, shall be adjudged guilty of felony, and on conviction thereof shall be punished by imprisonment in the penitentiary for not less than two years.

§ 2. All acts and parts of acts inconsistent with this act are hereby repealed.

§ 3. This act shall take effect and be in force from and after its passage.

Approved February 16, 1872.

B.

AN ACT *to amend an act* entitled "An act to incorporate the Alexandria and Bloomfield Railroad Company, approved February 9, 1857," authorizing said company to change the corporate name; also authorizing said company to extend said road from a point at or near Luray, in Clark County, Missouri, to Nebraska City, in Nebraska Territory, by way of or near Rockport, in Atchison county, Missouri, and also authorizing said company to adopt all or any of the sections of this act, the same to be binding on said railroad company.

Be it enacted by the General Assembly of the State of Missouri, as follows:

§ 1. That the Alexandria and Bloomfield Railroad Campany may change the corporate name of said company to that of the Alexandria and the Nebraska City Railroad.

§ 2. That said railroad company may extend said road from a point at or near Luray, in Clark county, Missouri, to Nebraska City in Nebraska Territory, on the most practicable and direct route by way of or near Rockport, in Atchison county, Missouri.

§ 3. That said company may consolidate said road or make any running arrangement with any railroad now constructed or that may be

hereafter constructed, in the State of Missouri, such as may be mutually agreed upon by the proper contracting parties connected with said railroad or roads.

§ 4. That the *whole of this act or any section thereof* as shall be adopted by the board of directors of the Alexandria and Bloomfield Railroad Company at any meeting of said board called for that purpose by the order of the board or a majority of said board, the secretary having given thirty days' previous notice in writing to each director, stating fully the object of said meeting, *shall be in force from and after its adoption.*

§ 5. This act to take effect and be in force from and after its passage.

Approved February 19, 1866.

C.

Registration Law of Missouri (Laws of Mo., 1868, p. 131):

SEC. 18. For the purpose of keeping the list of qualified voters complete, the clerk of the county court shall, *twenty days* before any special election (except elections for school purposes), cause to be delivered to the board of registration, or any member thereof, the books of registration returned by said board of registration, who shall immediately proceed to register the names of such persons as have become qualified voters after the closing of the registry, and also such persons as may be entitled to registration, but who, for any good and sufficient cause, failed to present themselves for registration at the last general registration. Said board shall, whenever an election is to be held in any election district within their county before the next general election, certify to the judges of election the additional names registered by said board, along with the general list made out at the preceding general registry. Said board shall complete said books of registration *five days* prior to said special election. *In making such registration, said board shall be governed by the provisions of the constitution and of this act as far as applicable to the general registration,* except that said board shall hold a session of but one day in any election district; and provided that no board of review shall be held for any special election.

SEC. 2. Between the first day of June and the first day of July next ensuing his appointment, the superintendent of registration shall proceed to appoint three suitable, competent, and discreet citizens, who shall be qualified voters under the constitution and laws of this State, as a board of registration, in each county in his senatorial district, each of whom shall serve until the next appointment of superintendent, as provided in the first section of this act. The senatorial superintendent shall cause notice in writing to be given to each of the persons so appointed by him, and shall also transmit to the clerk of the county court of each county in his senatorial district the names of officers so appointed. He shall fill any vacancy occurring in any of the appointments made by him, and may, in his discretion, remove any one so appointed by him for incompetency or for any other cause. He shall *cause notice to be given*, in conformity with the provisions of

section seven, of the times and places of the sessions of said board of registration *at least ten days* before the day of their first session, by publication in at least one newspaper in each county, if such there be, and also by at least three handbills posted up in public places in each election district; and if no such paper be published, then by posting up a written or printed notice at the office of the clerk of the county court of such county. In the county of St. Louis such notice shall be published in at least three daily newspapers, one of which shall be in the German language; he shall also, at the same time and in the same manner, cause notice to be given of the time and place of meeting of the board of review as hereinafter provided.

SEC. 7. The board of registration in each county shall attend, in discharge of their duties, at the usual place of voting in each election district in their respective counties, commencing not more than seventy days before the day of election in each year of a general election, and ending on or before the *eighteenth* day next preceding such election, and continuing in session at each election district in such county, not less than two nor more than five days, and shall, on such day, be in attendance, for the purpose of registration, from eight o'clock A. M. to six o'clock P. M., and, in cities having more than three thousand inhabitants, to nine o'clock P. M. If the superintendent deem it necessary, he may authorize said board of registration, in any county, to appoint additional days in any election district of such county within the limits prescribed in this section for the registration of voters. If, from any cause, any of such board are unable to attend in any election district at the time of the session of the board, any one of such board shall be authorized to proceed with the registration; but if more than one of the board shall be in attendance no person shall be registered as a qualified voter without the concurrence of at least two members of the board.

D.

General Statutes of Missouri, 1865, p. 240:

SECTION 1. Whenever two-thirds of the inhabitants of any town or village within this State shall present a petition to the county court of the county, setting forth the metes and bounds of their village and commons, and praying that they may be incorporated and a police established for the protection and regulation of any commons appertaining to such town or village, and the court shall be satisfied that over two-thirds of the taxable inhabitants of such town or village have signed such petition, and that the prayer of the petitioners is reasonable, the county court may declare such town incorporated, designating in such order the metes and bounds thereof; and thenceforth the inhabitants within such bounds shall be a body politic and corporate by the name and style of "The inhabitants of the town of ———" (naming it), and by that name they and their successors shall be known in law, have perpetual succession, unless disincorporated, sue and be sued, plead and be impleaded, defend and be defended in all courts

and in all actions, pleas, and matters whatsoever, may grant, purchase, hold and receive property, real and personal, within such town, and *no other*, burial grounds and cemeteries excepted, and may have a common seal, &c.

E.

Revised Statutes of Missouri, 1879, Vol. 2, Sec. 4383, page 868:

All cities and towns in this State containing five hundred and less than five thousand inhabitants, and all towns existing under any special law and having less than five hundred inhabitants, which shall elect to be cities of the fourth class, may so organize, &c.

SEC. 4385. Any city or town of the State not incorporated may become a city of the class to which its population would entitle it under this article and be incorporated under the law for the government of cities of that class upon petition to county court, &c.

SEC. 4386, page 869:

All rights and property of every kind and description which were vested in any city under its former organization shall be deemed and held vested in such city upon its becoming reorganized, as provided in the preceding section; but no rights or liabilities either in favor of or against such city, existing at the time of its being so reorganized, and no suit or prosecution of any kind shall be affected by such change, but the same shall stand and progress as if no change had been made.

F.

Section 21 of an act to incorporate the Lexington and St. Louis R.R. Company, interpreted in Webb *v.* Lafayette County (67 M. R., 370); Laws of Mo., 1859–60, 399:

It shall be lawful for the county court of any county in which any part of the route of said railroad may be, or any county adjacent thereto, to subscribe to the stock of the company or invest its three per cent. fund or other internal improvement fund belonging to the county in said road, and for the stock subscribed may issue the bonds of the county, etc.

Laws of Mo., 1859–60, page 400, amendatory act supplemental to the foregoing charter, section 2, the county court of Lafayette may in order to make its subscription to the capital stock of said company, &c., cause the bonds of the county to be issued in denominations of not less than fifty nor more than one thousand dollars, and they may be made to bear interest from the date of their issue at the rate of six per cent., any law to the contrary notwithstanding.

G.

Extract from Section IV of Constitution of Mo., 1865, concerning registration (G. S. Mo., 1865, 25):

The General Assembly shall immediately provide by law for a complete and uniform registration, &c. After which *no person shall vote unless his name shall have been registered at least* ten days before the day of election, and said registration shall not otherwise be shown than by the register, or by an authentic copy thereof certified to the judges of election by the registering officer or officers, or other constituted authority.

The suffrage amendment to the Constitution of Missouri, taking effect December 12, 1870, Wagner's Mo. Statutes, 1872, vol. 1, page 67:

"ART. 11. In place of sections 5, 15, 16, 17, and 18 of said article, the following is adopted:

"Every male citizen of the United States and every male person of foreign birth who may have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers to vote, who is over the age of twenty-one years, who has resided in this State one year next preceding his *registration* as a voter, and during the last *sixty days* of that period shall have resided in the county, city, or town where he seeks registration as *a voter*, who is not convicted of bribery, perjury, or other infamous crime, nor directly nor indirectly interested in any bet or wager depending upon the result of the election for which said registration is made, nor serving at the time of such registration in the regular Army or Navy of the United States, shall be entitled to vote at such election for all officers, State, county, and municipal, made elective by the people, *or any other election held* in pursuance of the *laws of this State*, but he shall not vote elsewhere than in the election district where his name is registerd," &c.

Office Supreme Court U. S.
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JAMES. H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 68.

WILLIAM HILL, PLAINTIFF IN ERROR,

v.

THE CITY OF MEMPHIS, MISSOURI.

Supplemental Brief of Defendant in Error.

Defendant in error, in order to comply with the rules of this Court, was compelled to print its brief before any assignment of error or brief had been filed by plaintiff in error. Plaintiff in error has since filed a brief. Assuming that the Court may possibly yet permit him to file his assignment of error, I now desire to comment briefly upon the authorities cited in his brief not anticipated by my ffrst brief.

There is not only no proof in the record that after the repeal of the charter of the Town of Memphis it was ever re-incorporated, but plaintiff in error, in the face of the fact that power of subscription of stock, either under the special charter or under the general railroad law, is limited to incorporated towns, is found at page 30 of his argument averring that in 1871 Memphis was an *unincorporated* town, in order that upon such allegation he may seek a basis for his argument that the special registration required would have been co-extensive with an *election district*. The contention of defendant in error is that every one was

bound to know that in twelve days' time there could not have been a special registration *anywhere in any district.* The cases cited at page 10 of my first brief are conclusive that no election, whether general or special, is valid without registration; that *any election* not held at proper time is void. When plaintiff in error claims power not recited in his bond, but alleged to depend upon an election, is it not incumbent upon *him* to show a *valid election?* His proof showed that there could not have been a valid one.

The statement in case of Judson *v.* Plattsburg, cited by plaintiff in error, shows (3 Dillon, 181) that there were bonds reciting the necessary vote.

The bonds herein (page 2 of my brief) show that no election was recited. In Pollard *v.* Pleasant Hill (3 Dillon, 195) the statement shows that there were two kinds of bonds; those referred to in citation erroneously attributed to Judson *v.* Plattsburg were not issued for railroad snbscription, but purported to be bonds issued in *funding city debt.* It was *admitted* in that case that there was legal authority to fund the floating city debt, and the bonds upon their face purported to be issued under that authority.

In the case of Seybert *v.* Pittsburg (1 Wall., 372), the statement shows that the power to the Corporation was to subscribe as fully in every respect "as an *individual* might," and therefore in the absence of restraining words the right to pay the subscription with bonds was implied. In the case of Rogers *v.* Burlington (3 Wall., 654), the city charter authorized the city council whenever they deemed it expedient to borrow money for any purpose to submit proposition to voters; the records fairly showed finding that such vote had been obtained. The same facts are shown in Gelpeke *v.* Dubuque. In Lynch *v.* County (16 Wall., at page 7), the statement shows that the bond recited that it was issued in accordance with a vote for building a court-house; and there was in that case implied power to borrow money.

The case of Ganse *v.* Clarksville (5 Dillon, 167), is shown by the statement to have been decided by a divided court, and then upon a clearly defined power in the *charter* as amended in 1857 authorizing a special tax of two per cent. to pay for subscriptions to macadamized roads, and that the stock should go to the tax-payer.

In the case of Ritchie *v.* Franklin County, (22 Wall., at page 70,) it is shown that the bonds were issued to pay for macadamizing roads, and this court justly says, at page 76, that there was no constitutional provision in Missouri preventing counties from borrowing money to improve their roads, and so the act of February, 1865, and the specific curative act of 1868 concerning bonds issued for

building such macadamized roads, were declared sufficient. It certainly is not admissible for the purposes of this plaintiff's case to confound such local improvements with corporate subscriptions to railway companies or other companies which were forbidden by the constitution of 1865. Every one familiar with the railroad legislation of Missouri knows that the general railroad law, as well as the very charter power recited in the bonds involved in this suit, contemplated the possibility that stock in railway companies might be paid with surplus funds of the corporation. So that with distinctions like those made in the charter there can be no doubt as to the intention of the Legislature to restrict incorporated towns to their surplus funds in payment of stock. While Counties under the charter power cited by plaintiff in error were authorized to issue bonds to *raise funds* to pay subscription and to take proper steps to protect the interests and *credit* of the county, incorporated towns were not endowed with power to protect the credit of such towns; in other words, had no implied power of taxation. If subscription by incorporated towns could only be paid out of funds on *hand*, not raised by issue of bonds, I am at a loss to understand how citizens would have been "protected from onerous taxation," by the law, which, it is contended authorized issue of bonds in payment of subscriptions which certainly were otherwise payable out of the surplus of the general annual tax levy over and above ordinary expenses of government, or out of property of the corporation subject to execution.

No one can read the special charter power herein involved, and the general railroad laws prior to 1865, when section 17 (page 8 of first brief) was substituted for section 30, R. S. of Mo., 1855, p. 427, without being convinced that in Missouri legislation loan of credit always meant issue of bonds.

No Missouri decision case has been or can be cited to contradict this interpretation, which I have shown by decisions cited in first brief to be fully confirmed. L. & D. R.R. Co. *v.* Buchanan Co. (39 M. R., 488–489); State *v.* Curators, &c. (57 M. R., 182, 183).

In Jarrolt *v.* Moberly (103 U. S.) it was contended by the bondholder, as in this case, that the passage of the law of January 30, 1872, forbidding, under penalty of imprisonment, any subscription of stock or issue of bonds without a two-thirds vote, implied that prior to that time it may have been lawful so to do; but Mr. Justice Field, citing the constitutional provision of 1865, shows that such acts had been for seven years forbidden.

Ogden *v.* Daviess Co. (102 U. S., 634) discussed an amendment to the Township Bond Law of March 23, 1868, the first section of which (L.

M., 1868, 93) distinctly declared that bonds could only issue in cases where by the terms of the election two-thirds of the voters had authorized such *issue of bonds* as well as subscription of stock.

In Cass County *v.* Johnson (95 U. S., at page 361) it is shown that the bond recited that it was issued under aforesaid Township Bond Law of March 23, 1868, and was authorized by a two-thirds vote of the qualified voters of said township.

The decisions cited in my first brief (page 10) are conclusive as to the absolute invalidity of the election as described upon the town record of February 16, 1871.

The case of McClure *v.* Oxford (94 U. S., at page 432) presents a case analogous to, but not as strong as, that made herein, enunciating the proposition that every man is chargeable with notice of that which the law requires him to know. The opinion in that case shows that although the bonds recited compliance with the law, inasmuch as there could not have been the thirty days' notice required by law the bonds were void.

HENRY A. CUNNINGHAM,
Attorney for Defendant in Error.

